APR 23 1974

MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 52, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF FLORIDA,

Defendant.

BRIEF OF AMICI CURIAE STATES OF DELAWARE, GEORGIA, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA AND VIRGINIA

BRICE M. CLAGETT
MICHAEL BOUDIN
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Amici Curiae

W. LAIRD STABLER, JR.
Attorney General of Delaware

JEROME O. HERLIHY
Chief Deputy Attorney General
Public Building
Wilmington, Delaware 19801

ARTHUR K. BOLTON
Attorney General of Georgia
ALFRED L. EVANS, JR.
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

JON A. LUND
Attorney General of Maine
LEE M. SCHEPPS
Assistant Attorney General
State House
Augusta, Maine 04330

(Cover continued on reverse side)

FRANCIS B. BURCH
Attorney General of Maryland
HENRY R. LORD
Deputy Attorney General
One South Calvert Street
Baltimore, Maryland 21202

ROBERT H. QUINN
Attorney General of Massachusetts
HENRY HERRMANN
Special Assistant Attorney General
State House
Boston, Massachusetts 02133

WARREN B. RUDMAN
Attorney General of New Hampshire
DAVID H. SOUTER
Deputy Attorney General
State House Annex
Concord, New Hampshire 03301

WILLIAM F. HYLAND
Attorney General of New Jersey
ELIAS ABELSON
Assistant Attorney General
198 West State Street
Trenton, New Jersey 08608

LOUIS J. LEFKOWITZ
Attorney General of New York
JOSEPH T. HOPKINS
Assistant Attorney General
State Capitol
Albany, New York 12224

ROBERT MORGAN
Attorney General of North Carolina
JEAN A. BENOY
Deputy Attorney General
P.O. Box 629
Raleigh, North Carolina 27502

RICHARD J. ISRAEL
Attorney General of Rhode Island
W. SLATER ALLEN, JR.
Assistant Attorney General
Providence County Court House
Providence, Rhode Island 02903

DANIEL R. McLEOD
Attorney General of South Carolina
EDWARD B. LATIMER
Assistant Attorney General
P.O. Box 11537
Columbia, South Carolina 29211

ANDREW P. MILLER
Attorney General of Virginia
GERALD L. BALILES
Deputy Attorney General
Supreme Court Building
Richmond, Virginia 23219

April 24, 1974

Washington, D.C. • CLB PUBLISHERS, INC. • (202) 393-0625

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
INTEREST OF AMICI CURIAE	2
PRIOR AND RELATED PROCEEDINGS	3
1. Institution of Original No. 35 and Severance of Florida Therefrom	3
2. Evidentiary Proceedings in Original No. 35	10
3. Original No. 52: Briefs and Master's Report	16
4. Comments of the Parties in Original No. 35 on the Special Master's Report in Original No. 52	19
ARGUMENT	20

TABLE OF CITATIONS

United States v. California, 332 U.S. 19 (1947)	2,4,5,10,13,14,15,16,17,21,22
United States v. Louisiana, 363 U.S. 1 (1960)	7
United States v. Maine *et al.*, No. 35, Original	2, 3

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 52, Original

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF FLORIDA,

Defendant.

BRIEF OF AMICI CURIAE STATES OF DELAWARE, GEORGIA, MAINE, MARYLAND, MASSACHUSETTS, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, RHODE ISLAND, SOUTH CAROLINA AND VIRGINIA

Amici curiae the States of Delaware, Georgia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, North Carolina, Rhode Island, South Carolina and Virginia file this brief, sponsored by their Attorneys General, pursuant to Rule 42(4) of the Rules of this Court.

QUESTION PRESENTED

This case, in which Florida is the defendant, and Original No. 35, in which amici curiae are the defendants,

place in issue for the first time the question of federal versus State ownership of the natural resources of the Atlantic continental shelf, and both cases raise the question whether this Court's decision in *United States v. California* should be applied to the Atlantic Ocean. The underlying historical, factual and legal issues have been fully developed in evidentiary proceedings in Original No. 35, which will probably be before this Court early next Term. Those underlying issues could not be and were not developed in this case, because Florida was expressly precluded from raising them when this case was severed from Original No. 35. The question presented is:

Should not this Court's consideration of this case be postponed for a brief period, so that it may be heard next Term together with Original No. 35, because (1) immediate consideration of this case without the benefit of the Master's report in Original No. 35 would deny the Court the opportunity of first confronting the issues on an adequate record and be inconsistent with this Court's reference of Original No. 35 to a special master; (2) reaffirmation by the Court in this case of the *California* doctrines and application of them to the Atlantic would seriously prejudice the rights and interests of amici curiae; and (3) no party will be injured by a short delay until next Term of the disposition of this case, or at least of the issues herein which overlap Original No. 35?

INTEREST OF AMICI CURIAE

Amici curiae are twelve of the thirteen Atlantic seaboard States. All of them are defendants in *United States v. Maine et al.*, Original No. 35. The aspects of the present case dealing with the Atlantic Ocean were originally a part of Original No. 35, but were severed from it on the theory that Florida's case presented no

issue of law or fact in common with the issues raised by the other twelve Atlantic seaboard States.

As this case proceeded, it developed that, notwithstanding the basis for severance, its disposition necessarily involves the resolution of several critical issues of fact and law which profoundly affect the rights and interests of amici curiae. These issues have been fully developed on an exhaustive evidentiary record in Original No. 35 before the Special Master, whose report in that case is imminent. Amici fear that a disposition of the present case, without the benefit of the record developed in Original No. 35, might result in determinations inconsistent with the historic title which they assert and would therefore be seriously prejudicial to their rights and interests.

PRIOR AND RELATED PROCEEDINGS

1. *Institution of Original No. 35 and Severance of Florida Therefrom*

The Atlantic Ocean issues in this case were formerly part of *United States v. Maine et al.*, Original No. 35, which was instituted in April 1969 by the filing of a Complaint by plaintiff against all thirteen Atlantic coastal States, *i.e.*, amici curiae and Florida. The issue raised by the Complaint was, and is, whether it is the United States or the defendant States which possess the exclusive right to explore and to exploit the natural resources of the seabed and subsoil underlying the Atlantic Ocean, extending seaward more than three miles from the ordinary low-water mark and from the outer limit of inland waters on the coast to the outer edge of the continental shelf. The Complaint sought to establish that exclusive right on behalf of the United States and to defeat any conflicting

"right, title or interest" claimed by the States. On June 16, 1969, this Court granted plaintiff's motion for leave to file the Complaint.

The Answers of the States varied in language, but generally claimed "some interest" in the area in question, denied plaintiff's claimed exclusive right, and asserted exclusive rights to explore and to exploit on behalf of themselves. See, *e.g.*, Answer of the State of Maine. Each of the twelve defendant States other than Florida alleged that it is the successor in title to the crown of England and certain of its grantees with respect to exclusive rights in the seabed and subsoil in question which were possessed by the crown of England and its grantees prior to the adoption of the United States Constitution, and that neither by virtue of anything in the Constitution nor otherwise have such rights been lost or transferred from the States to the United States.

The Answer of the State of Florida, on the other hand, relied solely for the source of its alleged title on a provision of its Constitution of 1868, approved and accepted by the United States Congress, which defined Florida's boundary in the Atlantic Ocean as the edge of the Gulf Stream. In Paragraph V of its Answer, Florida expressly disclaimed asserting any claim other than that said to flow from the boundary provision of its 1868 Constitution. In Paragraph VIII of its Answer, Florida raised a question concerning the location of the dividing line between the Gulf of Mexico and the Atlantic Ocean.

In January 1970 the United States filed a Motion for Judgment. In the brief accompanying its motion, the United States argued that all the contentions of the defendant States were precluded by this Court's decision in *United States v. California*, 332 U.S. 19, and subse-

quent cases.[1] These decisions, plaintiff argued, conclusively established that the Atlantic coastal States "had no rights in the submerged lands or natural resources seaward of the low-water line and outer limit of inland waters" during the colonial period, but that such rights had come into existence *ab initio* only after the formation of the Union and in favor of the Federal Government (pp. 21-23).

On January 30, 1970, the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, South Carolina and Virginia filed a motion for reference of the case to a special master. The moving States proposed that "the case should be referred to a master to take evidence, making findings of fact, conclusions of law and recommendations for decree, and that the master be specially instructed to consider and report upon the scope and validity of the historical claims of the States to the submerged lands in question" (p. 2). The moving States contended that, not having been parties to the *California* and subsequent cases, they were not bound by the decisions in those cases, and that they intended "to offer proof substantiating" their historic titles to the seabed and subsoil rights in question "and showing that any past rejection of them was error" (p. 8). Separate motions for reference of the case to a special master were filed by New York, New Jersey and Georgia.

---

[1] However, when Massachusetts sought leave to intervene in the *California* case when that action was pending in this Court, plaintiff had successfully opposed such intervention, stating: "Massachusetts cannot be affected by any judgment which may be enforced in this suit." Memorandum in opposition to motion of Massachusetts for leave to intervene, p. 1.

Florida also filed a motion for reference to a master, but in addition moved for severance of Florida from the other twelve States and for trial of Florida's case separately.

On June 8, 1970, the Court granted the various motions for appointment of a special master and appointed the Honorable Albert B. Maris, with authority to conduct evidentiary hearings and "to submit such reports as he may deem appropriate." The Court did not rule on Florida's motion for severance.

On December 18, 1970, Florida filed with the Special Master a memorandum of law in support of its motion for severance. Florida argued that severance was appropriate "since its boundary claims rest upon questions of law and fact entirely distinct from those applicable to the other defendant States, and, further, that . . . said boundary claim arises from an event or transaction entirely distinct from the events applicable to the other defendant States" (p. 1). Florida reiterated that its sole reliance was "upon express Congressional approval of her maritime boundaries at the time it was readmitted to the Union in 1868" (*ibid.*).

On January 8, 1971, the Common Counsel States[2] filed with the Special Master an answer to Florida's motion for severance, stating that they took no position thereon. The United States filed a memorandum opposing severance on the ground that the same underlying

[2] As used herein, and in the proceedings before the Special Master, this term refers to the States of Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island and Virginia, all of which were represented by the same joint counsel (as well as by their Attorneys General) before the Master.

constitutional and legal issues were involved with respect both to Florida and to the other defendant States. On January 14, 1971, the Special Master issued an order granting Florida's motion for severance.

On February 5, 1971, the United States, by the Solicitor General, addressed a letter to the Special Master suggesting that the Master submit to the Court a report recommending severance of Florida from Original No. 35 and consolidation of the issues respecting Florida with certain outstanding Florida-related issues in *United States v. Louisiana et al.*, Original No. 9. The Solicitor General's letter contained the following:

> "[T]he United States does not want to argue twice – once as to the twelve States remaining in No. 35, Original and again as to Florida in No. 9, Original – questions of colonial or constitutional law common to the Atlantic coast claims in both cases. It was our understanding that you did not intend to place us in that position, and it is our understanding from Florida's Amended Answer and from discussions with counsel for Florida that Florida does not intend to argue such questions, though it reserves the right to claim the benefit of any applicable ruling that the Court may make regarding those questions as to the twelve States remaining in No. 35, Original."

The proposed order suggested by the Solicitor General, and appended to his letter, carried through the above thought by the following proposed provisions:

> "It appears that the State of Florida, while reserving its right to the benefit of any applicable ruling that the Court may make in this case, does not itself intend to present any evidence or to make any argument with respect to the defenses raised by the other defendants herein – namely, those

defenses based upon the alleged rights of British colonies under colonial grants or charters, or based upon a claim that States of the Union have constitutional rights of a proprietary character in the submerged lands and natural resources of the bed of the territorial sea within their boundaries."

* * * * *

"This order is made upon the condition that in No. 9, Original, the State of Florida will not present any evidence or make any argument with respect to the rights of British colonies under colonial grants or charters, or with respect to any claim that States of the Union have purely constitutional rights of a proprietary character in the submerged lands or natural resources of the bed of the territorial sea within their boundaries; but the State of Florida shall be entitled in No. 9, Original, to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions, to the extent that such determination may be relevant and applicable to the factual situation of the State of Florida."

On March 29, 1971, the Special Master issued his Report Upon Motion of the State of Florida for Severance. The Master agreed that Florida's claim, resting as it did solely on the Constitution of 1868, "is entirely different from those of the other defendant states" (p. 2). The Master concluded (p. 3):

"On the basis of the position of Florida as thus stated, it appeared to me that while there are undoubtedly questions of law and probably also of fact common to the causes of action of the United States against the 12 defendant states other than Florida which have been joined in this action, there are no questions of law or fact, except possibly with respect to the construction of the Submerged Lands

Act, common to those 12 causes of action and the cause of action asserted against the State of Florida. I accordingly concluded that the cause of action against Florida was misjoined with the other 12 causes of action in this case and should be severed and proceeded with separately, as provided by Rule 21, F.R.C.P. Counsel for the United States agreed with this view."

At pp. 5-6, the Special Master adopted the condition quoted above, suggested by the United States, which limited the evidence and arguments which Florida could present in the recommended severed and consolidated proceeding:

"This order should be upon the condition that the State of Florida will not present any evidence or make any argument in the consolidated cause with respect to the rights of the British colonies under colonial grants or charters, or with respect to any claim that the States of the Union have purely constitutional rights of a proprietary character in the submerged lands or the bed of the sea adjacent to their coasts; but the State of Florida should be entitled in the consolidated cause to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions to the extent that such a determination may be relevant and applicable to the factual situation of the State of Florida."

On March 29, 1971, the United States and the State of Florida filed a Joint Motion in No. 9 Original to implement the Special Master's Report by consolidating the Florida-related issues in No. 9 Original and No. 35 Original and to appoint a special master. On June 28, 1971, the Court granted this motion, as well as Florida's motion for severance, and appointed Judge Maris Special

Master in the new consolidated proceeding, which was docketed as No. 52 Original.

2. *Evidentiary Proceedings in Original No. 35*

In the meantime, proceedings had begun before the Special Master in No. 35 Original, involving the twelve defendant States other than Florida, with a conference on July 28, 1970. Those proceedings have continued for almost four years. Briefing was completed in March 1974, and the case is now pending before the Special Master for his report. Evidentiary hearings were held before the Special Master totaling 14 days of testimony, with a transcript of 2,800 pages. The testimony of ten expert witnesses was heard: five on behalf of the United States, four on behalf of the Common Counsel States, and one on behalf of the State of Virginia. Plaintiff and all the defendant States introduced voluminous exhibits, totaling 1,257 in number and amounting to many thousands of pages. The briefing schedule has involved more than one year, and briefs totaling some 1,200 pages have been filed.

In these proceedings the defendant States have introduced massive evidence, never previously before this Court, to establish that they have valid historic titles to the seabed and subsoil resources at issue in Original No. 35, notwithstanding the Court's belief in the *California* case, arrived at without the benefit of any evidentiary record, that no such historic titles existed.[3] For the

[3]Original No. 35 is the first of the "tidelands" or continental-shelf cases which the Court has referred to a Special Master for evidentiary proceedings bearing on the underlying legal issues. In the *California* and all succeeding cases those issues were decided on the pleadings and briefs alone.

convenience of the Court, amici curiae file herewith ten copies of the Brief for the Common Counsel States (Annex 1 hereto, volumes 1 and 2) and of the Rejoinder Brief for the Common Counsel States (Annex 2), submitted to the Special Master, in which the contentions made in Original No. 35 are fully set forth together with the evidentiary basis for them.[4]

At pp. 4-5 of their Brief (Annex 1, volume 1) the Common Counsel States summarized their contentions as follows:

> "Very briefly, the position of the Common Counsel States is that the record establishes that under the law and practice of England prior to and during the 17th and 18th centuries the seabed comprising the continental shelf of England and of English possessions was subject to an exclusive right of exploitation in favor of the English crown. In that period no generally recognized principle of international law prohibited or denied that exclusive right to the English crown. During the period 1492 to 1776, England acquired by right of discovery and the performance of symbolic acts of sovereignty the territories now comprising the defendant States and the adjacent continental shelf. During that period the crown granted its right of exploitation over part or all of that continental shelf to colonial proprietorships and governments. At American indepen-

[4] The purpose of this submission is not, of course, to litigate the issues in Original No. 35 in advance of the Special Master's Report. Rather, the briefs are submitted to show the nature of the contentions involved and to give some indication of the extensive supporting evidence which will be included in the record in Original No. 35.

dence those rights passed individually to the successor independent States. If any portion of the Atlantic continental shelf was not granted to the colonial proprietorships and governments by the crown prior to 1776, then such portions were retained by the crown until they passed to the adjacent coastal States individually at independence.

"Nothing has occurred since 1776 which has divested the defendant States of the right of exploitation of the continental shelf which they had thus acquired. The States preserved their respective rights when they entered into the Articles of Confederation and into the Constitution of the United States. Nor have those rights been divested by any acts of abandonment or renunciation on the part either of the United States or of the States from 1776 down to the present, or by operation of international law. Thus they still exist in their full force and vigor.

"Finally, even if it should be held, contrary to our submission, that the exclusive right here at issue did not exist on behalf of any one prior to 1945, but came into existence as a wholly new right between 1945 and 1958, then it is the position of the Common Counsel States that it came into existence as a right of the States rather than of the Federal Government, because of the allocation of powers and property incorporated in our Constitution, and particularly because of the status of the defendant States as residual sovereigns of their land territory and as owners of the unallocated or ungranted public lands within their territories or appurtenant thereto."

Each of the above contentions involves important questions of fact which this Court has never decided on the basis of an evidentiary record, though it expressed

views respecting many of them without such a record in the *California* case. The evidence submitted by amici curiae to the Special Master included the testimony of expert witnesses who testified in detail that the seabed and subsoil rights at issue were owned by the crown of England long before plaintiff came into existence and were fully recognized by English law, American colonial law and international law long prior to 1776. Amici's experts also testified, on a factual basis, that it was never intended that such rights be extinguished or transferred to the Federal Government during the revolutionary or Confederation periods or pursuant to the Constitution, but rather that factual analysis demonstrates that these rights were intended to, and did, remain with the individual States as successors in title to the antecedent colonial governments and to the English crown. Further, amici introduced expert testimony and other evidence to show that there is no inconsistency between State ownership of these rights and the federal foreign affairs and defense powers as was assumed in the *California* decision.[5]

The proposed findings of fact and conclusions of law submitted by the Common Counsel States to the Special

[5] The witnesses for the Common Counsel States were Lyman B. Kirkpatrick, Jr., Professor of Political Science at Brown University and former Executive Director of the Central Intelligence Agency; Morton J. Horwitz, Assistant Professor of Law at Harvard Law School; Philip C. Jessup, former Judge of the International Court of Justice and former Hamilton Fish Professor of International Law and Diplomacy at Columbia University, and Joseph H. Smith, George Welwood Murray Professor of Legal History at Columbia Law School. Virginia's witness was David H. Flaherty, Assistant Professor of History at the University of Virginia.

Master in Original No. 35 are set forth at the beginning of the Brief for the Common Counsel States (Annex 1, volume 1), pp. F-1 *et seq.* Many of these proposed findings and conclusions would, if accepted by the Special Master, require this Court to reexamine statements relating to historical fact and to the factual basis for conclusions of constitutional law made by this Court in the *California* case. See, *e.g.*, Findings and Conclusions 1, 8, 12, 22-45, 50-53, 55, 64-70. Amici have, in short, pursuant to the clear mandate given to the Special Master by this Court in granting the motions for reference to a master, asked the Special Master to make a thoroughgoing examination of the factual underpinnings of amici's case even though this could involve conclusions directly at variance with views expressed by this Court in *California* without the benefit of an evidentiary record.

The United States has not disagreed with amici that these issues are properly before the Special Master. The United States has itself introduced voluminous evidence on these issues, and presented the testimony of five witnesses treating the same subjects as those dealt with by amici's witnesses. The several briefs filed by the United States do not dispute the relevance of any of these issues, but rather argue all of them on their merits. The United States has indeed relied heavily on the *California* decision, but recognizes that that decision cannot dispose of the issues in the context of the reference to the Special Master, and has confined itself to contending that the *California* and subsequent decisions place "a heavy burden" on amici in demonstrating the erroneousness of the views expressed in those decisions. Brief of the United States, pp. 25-29. The United States' proposed findings of fact and conclusions of law likewise deal with the merits of amici's contentions and evidentiary presentation.

In their Rejoinder Brief (Annex 2), pp. 2-3, the Common Counsel States summarized their position on *California* as follows:

> "We think it so clear as not to require extended discussion that in declining to grant plaintiff's motion for judgment on the pleadings, and in granting the motion of the Common Counsel States for reference to a Special Master, the Supreme Court indicated its desire that the States' contentions be examined on their merits, rather than being foreclosed at the outset by reliance on the *California* decision as plaintiff had urged. So far as that requires, the Special Master has a mandate to take a wholly fresh look at the soundness of the *California* and subsequent decisions and to recommend in his report that they be overruled if they are found to have been historically and constitutionally unsound. Otherwise the entire proceeding before the Special Master would have been a pointless exercise. As we understand plaintiff's position, it recognizes that the Special Master may properly recommend the overruling of *California*, but contends that he should do so only if defendants have sustained 'a heavy burden.' We think this position is inconsistent with the desire for a fresh evaluation which the Supreme Court's action expressed, and also unsound for the reasons stated at Br. pp. 5-7. Finally, while we believe it unnecessary that we sustain 'a heavy burden,' we submit that the evidence adduced in this proceeding does decisively demonstrate the historical and constitutional unsoundness of *California* and its progeny."

The United States filed a Response to the Rejoinder Brief, but expressed no disagreement with the position stated above.

3. *Original No. 52: Briefs and Master's Report*

The evidentiary hearings in the severed *Florida* case, which were conducted pursuant to narrow limitations on Florida's right to present evidence (see p. 9, *supra*), were much less extensive than those in Original No. 35. Similarly, the United States refrained from introducing the evidentiary materials which it has introduced on its own behalf in Original No. 35. As a result, briefing was completed in August 1973 and the case was submitted to the Special Master for decision.

In its Brief to the Special Master, notwithstanding the basis on which Florida had been severed from the other twelve States in Original No. 35, the United States took the position that "the question of the extent of state sovereignty under the Constitution is similar with respect to all thirteen States" (Post-Trial Brief of the United States, p. 4). The United States relied heavily on the *California* decision as applicable to all coastal states and as precluding a decision in Florida's favor. After citing *California* and its progeny (*id.* at 11), the United States declared:

> "The dispute in the present case – *i.e.*, who has the right to the natural resources of the seabed and subsoil in the disputed area off the coast of Florida – is similar to the disputes in the cases cited above. Those Supreme Court decisions provide the basic law for resolving this dispute." *Id.* at 12.

In particular, the United States relied on *California* as holding that (1) during the colonial period no seabed or subsoil rights existed in the continental shelf (*id.* at 20); (2) our law prior to 1945 did not recognize, and in fact precluded, any seabed and subsoil rights beyond the three-mile territorial sea (*id.* at 20-21); (3) seabed and subsoil resources, including those in the Atlantic, beyond

three miles were first claimed by President Truman in 1945 (*id.* at 21-22); (4) under the Constitution, the States own only "inland waters," and the bed and subsoil of all waters below low-water mark in the sea belong to the United States unless expressly alienated by it (*id.* at 12-13). Every one of these propositions is a subject of intense controversy in Original No. 35 and has been the subject of extensive evidentiary proceedings and voluminous briefing therein.

Florida's brief relied solely on the approval by Congress of its 1868 Constitution and the maritime boundary described therein. That confirmation, Florida argued, entailed the conveyance by the United States to Florida of exclusive seabed and subsoil rights within the boundary. Post-Trial Brief of the State of Florida, pp. 17-38. This contention, of course, contradicted the view expressed in *California*, relied on by the United States, that no seabed and subsoil rights beyond three miles existed until 1945, and thus that such rights could not have been conveyed to Florida in 1868. Florida was powerless to rebut this contention on historical grounds, since the Special Master's Report on severance had expressly precluded Florida from presenting any evidence or making any argument "with respect to the rights of the British colonies under colonial grants or charters" (p. 9, *supra*). Nor could Florida argue that *California* was wrong as a matter of constitutional law, since the Special Master's Report had also expressly precluded it from presenting evidence or making arguments "with respect to any claim that the States of the Union have purely constitutional rights of a proprietary character in the submerged lands or the bed of the sea adjacent to their coasts" (p. 9, *supra*). Florida was restricted to making the narrow argument that "the holding in the *California*

case has been overruled, in effect, by the submerged lands act." Post-Trial Brief of the State of Florida, p. 32.

Amici were not parties to Original No. 52 and received no notice of any of the proceedings therein or copies of the briefs filed. The Special Master's Report of January 18, 1974, a copy of which was mailed to amici and their counsel by the Special Master, was the first inkling amici had had that issues intimately involved in their own litigation had been raised and argued in Original No. 52.

Given the limitations under which Florida was struggling, the result was almost a foregone conclusion. The Special Master's Report of January 18, 1974, rejected Florida's contentions out of hand:

> "In the opinion of the Court in *United States v. California*, 1947, 332 U.S. 19, 38-39, it was expressly held that the United States, rather than the State of California, has paramount rights in and power over the marginal belt of territorial sea, an incident of which is full dominion over the resources of the seabed within that water area . . . Later, the Court expressly pointed out that the doctrine of *United States v. California*, 1947, 332 U.S. 19, is applicable to all coastal states. *United States v. Louisiana*, 1960, 363 U.S. 1, 7.
>
> "The State of Florida contends that the United States accepted the cession of Florida from Spain as a trustee for the states later to be created from that territory, that the cession included rights of ownership in the maritime belt of territorial sea along its coasts and that when the State of Florida was admitted to the Union it received those rights as trustee for its people. *Pollard's Lessee v. Hagan*, 1845, 3 How. (U.S.) 212 and *Shively v. Bowlby*, 1894, 152 U.S. 1, are relied upon to support this position. It is a sufficient answer to this contention, however, to recall that the doctrine of these cases

was restricted by the Court in *United States v. California*, 1947, 332 U.S. 19, 36, to the inland waters of a state shoreward of the low-water mark along its coast and that the doctrine is not applicable, as the State of Florida contends, to the seabed of the ocean seaward from the low-water mark." Report, pp. 9-10.

4. *Comments of the Parties in Original No. 35 on the Special Master's Report in Original No. 52*

The Rejoinder Brief for the Common Counsel States in Original No. 35 (Annex 2), filed a few weeks after the Special Master's Report in Original No. 52, commented on that Report as follows (pp. 4-6):

"In his Report in *United States v. Florida* (Supreme Court, Oct. Term 1973, No. 52 Original, January 18, 1974), the Special Master relied on *United States v. California* in rejecting Florida's claims, and pointed out the language in *Louisiana* to the effect that *California* is 'applicable to all coastal States.' Report, pp. 9-11."

* * * * *

"We believe that the Special Master's reliance on *California* in his Florida Report was conditional upon the following language of his earlier Report recommending severance: 'Florida disclaimed any intention to claim any rights derived from England under colonial grants or charters or any purely constitutional rights of a proprietary character in its capacity as a state of the Union, except that if any such rights should hereafter be determined in this case to exist with respect to any of the other 12 defendant states, Florida would want to be entitled to the benefit of that determination to the extent relevant and applicable to its factual situation.' Report of the Special Master upon Motion of the State of Florida for Severance, p. 3. We think it

apparent that the effect of the above language was to hold the question of the validity of *California* in abeyance in the *Florida* litigation, with Florida later to obtain the benefit of any overruling of *California* in the instant litigation 'to the extent relevant and applicable to its factual situation.' Consequently, the Report in applying *California* to Florida's case presumably did so by assuming the correctness of that decision *arguendo* and did not foreclose Florida, let alone the Common Counsel States, from the benefits which might accrue if, in this case, the Master determines to recommend that *California* be overruled."

The United States filed a Response to the Rejoinder Brief from which the above passage is quoted, but in that Response did not take issue with or comment in any way upon the above passage.

ARGUMENT

Florida's case is now before the Court. The case of the other twelve Atlantic States has been submitted to the Special Master and will doubtless be before the Court next Term, probably early next Term. Amici urge that this Court postpone argument and decision in the instant case for the short time until Original No. 35 is also brought before it. The basis for this request is severalfold.

First, the two cases are interrelated and consideration of them together will assure that common issues are determined on the most complete evidentiary record. Notwithstanding the basis on which the *Florida* case was severed from that of the other States, it is now apparent from the briefs and arguments, and from the Special Master's Report in Original No. 52, that both cases share in common a number of issues of critical importance. Among those issues are the following:

1. Whether any title or proprietary rights existed in the seabed and subsoil of the Atlantic continental shelf beyond three miles prior to 1945.

2. Whether such proprietary interests as the States might otherwise have had in the seabed and subsoil are consistent, in light of relevant factual, historical and constitutional considerations, with the relationship of the States and the Federal Government.

3. Generally, whether certain views expressed by the Court in *United States v. California*, concerning or involving the history of seabed and subsoil rights and claims in English, American colonial, early American federal and international law and practice, should be reaffirmed and applied without change to the Atlantic continental shelf, or whether upon reexamination they should be modified in various respects.

In the instant case, the Court is being asked by the United States to adopt for the first time the *ratio decidendi*, dicta and factual assumptions and conclusions of the *California* decision in a case involving State versus federal ownership of seabed and subsoil rights in the Atlantic continental shelf. Yet the record and argument in this case were developed without the participation of amici – that is, without twelve of the thirteen Atlantic coastal States – and under limitations which expressly precluded Florida from making any effective argument that *California* should not be so applied. In Original No. 35, on the other hand, the interested parties have participated and a full record on the relevant issues has been made. Only through review of the forthcoming Special Master's Report in Original No. 35 can this Court determine on an adequate record whether views expressed in *California* should be applied to the Atlantic seaboard or not. Only Original No. 35 has involved the

complete evidentiary analysis of the relevant issues which this Court obviously contemplated and desired when it referred the original, unsevered case to a Special Master.

It is, of course, common practice for this Court to consider together interrelated cases involving common issues. This course serves to avoid duplication and allows all relevant issues to be resolved at the same time. This approach is especially appropriate here, moreover, because it is Original No. 35 that will provide the essential factual background against which the common issues must be evaluated and resolved.

Second, amici believe they could be seriously prejudiced if the Court were to proceed to decide Original No. 52 before receiving the Special Master's Report in Original No. 35. The position of amici throughout has been that only evidentiary hearings could lay a proper basis for determining whether views expressed in *California* were still viable and should be applied to the Atlantic continental shelf. This Court obviously believed that evidentiary hearings would assist it in resolving these questions, since it rejected the motion of the United States for summary disposition and granted the motions of the States for reference of the case to a special master.

That evidentiary basis has now been fully laid, and within a few months the Court will have the benefit of the analysis of it by an exceptionally able and distinguished Special Master. No interest will be harmed if the Court waits to avail itself of these important advantages before moving to decide issues necessarily and inextricably involving the continued vitality *vel non* of the California doctrines and their applicability to the Atlantic continental shelf. On the other hand, an affirmance by the Court of the Special Master's *Florida* Report, without waiting for his report in Original No. 35,

would create precedents injurious to the interests of amici and in their view wholly unsound. In the light of the imminence of the time when the Court will be in a posture permitting orderly decision of the issues, a short delay in the disposition of the *Florida* case is fully justified and indeed essential.

The outcome of this litigation is of immense importance to the Atlantic coastal States, since it will determine whether and to what extent they retain proprietary interests in the vast and valuable mineral resources lying off their shores. Amici have already devoted great time and expense to providing the Special Master with extensive expert testimony and documentary evidence to establish their claims and to refute factual and policy contentions of the United States made on its own behalf. Amici respectfully but earnestly suggest that fairness to them warrants delaying the resolution of this case until amici can also be heard and can make available to the Court the full factual record now being appraised by the Special Master.

Third, there can be no significant prejudice to any party from the short delay here sought in the disposition of this case. The United States may contend that it is important to expedite the decision in this case in order to begin exploitation of the undersea resources lying off Florida's coasts. The relief amici seek applies only to that aspect of the case in which Florida seeks to establish, on the basis of its 1868 Constitution and the approval thereof by Congress, its entitlement to seabed and subsoil rights in the Atlantic Ocean beyond three miles. On the basis of the Special Master's Report and the briefs to him in Original No. 52, there is no overlap of facts or issues between that case and Original No. 35 with respect to the issues regarding the dividing line between the Atlantic and the Gulf of Mexico or regarding Florida's claim to certain alleged historic bays as internal waters. It appears

more reasonable to postpone disposition of this case as a whole; but if the United States should contend that there is some reason for expedition in deciding any of these issues, it would be feasible for the Court to decide them while preserving the issues overlapping Original No. 35 for disposition along with that case next Term.

If the United States should contend that there is some reason for expedition in deciding the issues which overlap Original No. 35, the short answer is that the United States cannot in any event obtain clear title to the Atlantic outer continental shelf off Florida prior to the decision of Original No. 35. This is so because of Florida's entitlement "to the benefit of any determination that the Court may make in No. 35, Original, with respect to those questions to the extent that such a determination may be relevant and applicable to the factual situation of the state of Florida." Report of the Special Master Upon Motion of the State of Florida for Severance, see p. 9, *supra*.

Moreover, the delay cannot be substantial in any event. The report of the Special Master is expected at any time and Original No. 35 should be ripe for disposition by this Court at its next Term. This litigation has been pending for several years and the United States has not heretofore argued that there were extraordinary reasons requiring special expedition. In view of the time and effort already devoted to the litigation, there is all the more reason to

follow the course that will result in the most orderly and mature disposition of the common issues.

Respectfully submitted,

BRICE M. CLAGETT

MICHAEL BOUDIN
Covington & Burling
888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Amici Curiae

W. LAIRD STABLER, JR.
Attorney General of Delaware
JEROME O. HERLIHY
Chief Deputy Attorney General
Public Building
Wilmington, Delaware 19801

ARTHUR K. BOLTON
Attorney General of Georgia
ALFRED L. EVANS, JR.
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334

JON A. LUND
Attorney General of Maine
LEE M. SCHEPPS
Assistant Attorney General
State House
Augusta, Maine 04330

FRANCIS B. BURCH
Attorney General of Maryland
HENRY R. LORD
Deputy Attorney General
One South Calvert Street
Baltimore, Maryland 21202

ROBERT H. QUINN
Attorney General of Massachusetts
HENRY HERRMANN
Special Assistant Attorney General
State House
Boston, Massachusetts 02133

WARREN B. RUDMAN
Attorney General of New Hampshire
DAVID H. SOUTER
Deputy Attorney General
State House Annex
Concord, New Hampshire 03301

WILLIAM F. HYLAND
Attorney General of New Jersey
ELIAS ABELSON
Assistant Attorney General
198 West State Street
Trenton, New Jersey 08608

LOUIS J. LEFKOWITZ
Attorney General of New York
JOSEPH T. HOPKINS
Assistant Attorney General
State Capitol
Albany, New York 12224

ROBERT MORGAN
Attorney General of North Carolina
JEAN A. BENOY
Deputy Attorney General
P.O. Box 629
Raleigh, North Carolina 27502

RICHARD J. ISRAEL
Attorney General of Rhode Island
W. SLATER ALLEN, JR.
Assistant Attorney General
Providence County Court House
Providence, Rhode Island 02903

DANIEL R. McLEOD
Attorney General of South Carolina
EDWARD B. LATIMER
Assistant Attorney General
P.O. Box 11537
Columbia, South Carolina 29211

ANDREW P. MILLER
Attorney General of Virginia
GERALD L. BALILES
Deputy Attorney General
Supreme Court Building
Richmond, Virginia 23219

April 24, 1974

CERTIFICATE OF SERVICE

I hereby certify that I have this 24th day of April caused three copies of the foregoing Brief of Amici Curiae to be mailed, postage prepaid, to The Honorable Robert H. Bork, Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, and to W. Robert Olive, Jr., Esquire, Special Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32304.

BRICE M. CLAGETT

April 24, 1974

SUBJECT INDEX

Defendant's Exceptions to Report of Special Master 1
Introduction 5
ARGUMENT: POINT I–Exceptions to the legal premise upon which the Master approached the issues 7
A. The doctrine announced in *United States v. California* is inappropriate to the instant case 7
B. The Submerged Lands Act did not re-write Florida's historic boundaries 15
ARGUMENT: POINT II–The specific findings and exceptions 18
A. Florida's boundary (as contained in Article I of Florida's 1868 Constitution–Florida's historic and lawful boundary) .. 18
B. Florida's Historic boundary was not limited by the 1962 Amendment to the 1885 Constitution of Florida 28
C. Florida's Historical Inland Water Claim 31
1. Concept of historic waters 32
2. Florida Bay 37
3. The boundary between the Atlantic Ocean and the Gulf of Mexico is at Latitude 25° 40′ North 50
4. Florida's Claim to Florida Bay as a Juridical Bay 57
Summary 59

TABLE OF AUTHORITIES

Cases

Askew v. American Waterways, Inc. 411 U.S. 325 (1973) 50
Carter v. Carter Coal Co., 298 U.S. 238 (1935) 13
Central R.R. Co. v. Jersey City, 208 U.S. 473 (1907) 13
Coastal Petroleum Company v. Secretary of the Army, et al., 318 F.Supp. 845 (S.D. Fla. 1971) 12
Coyle v. Smith, 221 U.S. 559 (1910) 13
Currier v. Nelson, 96 Cal. 505 (1892) 26
Hilton v. Guyot, 159 U.S. 113 (1895) 33
Keith v. Clark, 97 U.S. 454 (1878) 13
M'Ivers Lesse v. Walker, 4 Wheat (U.S.) 444, (1819) 26
Lane County v. Oregon, 7 Wall (74 U.S.) 71 (1868) 13
Louisiana v. Mississippi, 202 U.S. 1 (1906) 13, 16
McCulloch v. Maryland, 4 Wheat (U.S.) 316 (1819) 13
Manchester v. Massachusetts, 139 U.S. 240 (1891) 50
Michigan v. Ohio, 404 U.S. 933 (1971) [No. 30 Original] 26, 27
New Mexico v. Colorado, 267 U.S. 30 (1924) 17

Oklahoma v. Texas, 272 U.S. 21 (1926) 17
The Paquette Habana, 175 U.S. 677 (1899) 32
Peterson v. U.S., 191 F.2d 154 (1951) 30, 31
Pollard's Lesse v. Hagan, 3 Howard (U.S.) 212 (1945) .. 12, 13, 14
Pope v. Blanton, 10 F.Supp. 18 (N.D. Fla. 1935) 9
Skiriotes v. Florida, 313 U.S. 69 (1940) 13
Sowles v. Minor, 82 Vt. 344, 73 A. 1025 (1909) 26
State v. Muncie Pulp Co., 119 Tenn. 47, 104 S.W. 437 (1907) 17
Texas v. White, 7 Wall (74 U.S.) 700 (1968) 13
United Kingdom v. Norway, (1951) International Court of Justice, Rep. 116 ..... 32, 33, 36
United States v. California, 332 U.S. 19 (1947) .. 7, 8, 9, 12, 14, 50
United States v. Florida, 363 U.S. 121 (1960) [No. 9 Original] 8, 9, 11, 18
United States v. Florida, Tallahassee Civil Action No. 1672 (D.C., Fla., December, 1970) 48
United States v. Louisiana, 339 U.S. 699 (1949) 10
United States v. Louisiana, 394 U.S. 11 (1969) 32, 38
United States v. Texas, 339 U.S. 707 (1949) 9
Utah v. United States, 403 U.S. 9, (1971) 13

United States Constitution

Article IV, Section 3 ..... 17, 29

Statutes and Treaties

Outer Continental Shelf Lands Act of 1953, 67 Stat. 462 25
Treaty of Amity, Settlement and Limits between U.S. and Spain (1819) Article 2 40
33 U.S.C. § 1 et seq. 12
43 U.S.C. § 1301 ..... 11, 50
43 U.S.C. § 1301 (c) 19
43 U.S.C. § 1301 (4) 30
Act of June 25 1868 (15 Stat. 73) 1, 15, 59

Florida Constitution

1868 Constitution of Florida 15, 18, 22, 24
1885 Constitution of Florida, (Amendment to Article 1) 1

Florida Statutes

Section 370.21—Florida Territorial Water Act 45, 46

Laws of Florida

Chapter 29744, 1955 ..... 1, 29, 52, 53
Chapter 71-348, 1971 53
Chapter 70-162, 1970 45
Chapter 57-358, 1957 45
Chapter 61-470, 1961 45

Books

I KENT, *Commentaries on American Law 30* 24
Oppenheim, *International Law, Volume I,*
8th Ed. (1955), pg. 555 36
Shalowitz, *Shore and Sea Boundary, Vol. One*
(1962) at page 29 24
33 Brit. Yearbook Int'l Law 114 at 119-21
(MacGibbon, "Customary International
Law and Acquiescence" (1957) 34
Encyclopedia Brittanica, 1957 Edition,
Vol. 15 at page 397 53
Encyclopedia Brittanica, 1971 Edition 54
McGraw-Hill Encyclopedia of Science and
Technology, (1971 Edition) page 338 54

International Court of Justice

1951 I.C.J., Rep. 130 33
1951 I.C.J., Rep. 142 37
1951 I.C.J., Rep. 116 32

United Nations Documents

U.N. Doc. A/CN 4/143
(Bourguin "Les Baies Historiques" in Me'langes Georges Sauser-
Hall (1952) 34
U.N. Doc. A/CN 4/143 (Fauchille, *Traite de droit International*
Public, Tome 1er 2e Partie, 8e (1925) 36
U.N. Doc. /Conf. 13/1 Historic Bays 38
U.N. Doc. A/Conf. 13/1 (1957), (Memo prepared by U.N. Secre-
tariat on Historic Bays) 33
U.N. Doc. A/conf. 13/1 at 37 (Ser. L.O.N.P. 1930, V. 16, pg. 107) 37
U.N. Doc. A/Conf. 13/L. 52 and ratified by the United States on
March 24, 1961. See 15 U.S.T. (pt. 2) 1606 32
U.N. Doc. A/Cn. 4/143 at 31-34 33

Other

91 Congressional Record 9623 7
99 Congressional Record 2830 15
1930 Conference on the Codification of International Law of the U.S.
1958 Territorial Sea Convention 32
Article 12, Paragraph 1 ..... 34, 37
Article 7, Paragraph 4 ..... 34, 37
Joint Pre-Hearing Statement dated 1971
(executed by Ervin Griswold, Solicitor
General of the United States) 32
Bulletin of the Geological Society of America, (1972
Edition), "Geology & History of the Gulf of Mexico" 55
Bulletin of the Geological Society of America
(1971 Edition) 55
International Hydrographic Bureau's
Special Pub. No. 23 entitled
Limits of Oceans and Seas 50

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 52, ORIGINAL

UNITED STATES OF AMERICA
Plaintiff,

-v-

STATE OF FLORIDA,
Defendant.

DEFENDANT'S EXCEPTIONS TO REPORT OF SPECIAL MASTER

The Defendant, State of Florida, by its undersigned attorneys, files the following exceptions to the Special Master's Report bearing date of January 18, 1974 heretofore filed in this cause:

1. That the Master erred wherein he found that the act of June 25, 1868, 15 Stat. 73, approving Florida's boundary was not an express or implied grant to the State of Florida of the right, title and interest possessed by the United States within such area or of such rights and interests subsequently acquired by the United States.

2. That the Master erred wherein he found that Chapter 29744, Laws of Florida, 1955 and the November 6, 1962 Amendment to Article I of the 1885 Constitution of Florida had the effect of abandoning claim by the State of Florida in

the seabed beyond three miles in the Atlantic Ocean and three leagues in the Gulf of Mexico.

3. That the Master erred wherein he found that the dividing line between the Gulf of Mexico from the Atlantic Ocean is a line running due north along the meridian of longitude 83 degrees west, from the coast of Cuba to latitude 24 degress 25 minutes north; thence due east along the parallel of latitude 24 degrees 35 minutes north to Rebecca Shoal, at longitude 82 degrees 34 minutes west; thence along the shoals and the Florida Keys to the mainland at the eastern end of Florida Bay. The Master should have found that the Florida Keys and the straits of Florida southwest of longitude 25 degrees 40 minutes north are to be considered part of the Gulf of Mexico, not the Atlantic Ocean.

4. That the Master erred wherein he construes that portion of the 1868 Constitution of Florida which reads: "then down the middle of said river (the St. Marys) to the Atlantic Ocean, thence southwestardly along the coast to the edge of the Gulf Stream;" to mean that Florida by virtue of its 1868 Constitution has no marine boundary on the Atlantic Coast from the mouth of the St. Marys River to a point one geographic mile north of the Lake Worth inlet.

5. That the Master erred wherein he construes that segment of the 1868 Florida Constitutional Boundary which reads: "thence northeastwardly to a point three leagues from the mainland" to mean the boundary of the State of Florida in that part of the Gulf of Mexico is a line from the Dry Tortugas Islands to Cape Romano at a uniform distance of three marine leagues seaward from the coastline of the State. He should have found that the boundary from the Dry Tortugas Islands to Cape Romano is a straight line north 045 degrees east drawn from a point three leagues north of the northern most island of the Tortugas to a point three leagues from the mainland.

6. That the Master erred wherein he found the location of the present State boundary for the purposes of the Submerged Lands Act to be defined as follows:

> Marine boundary of the mainland and Florida Keys. Beginning at a point in the middle of the St. Mary's River at its mouth in the Atlantic Ocean north of Amelia Island, and extending thence seaward in the Atlantic Ocean three geographical miles from the coastline; thence in a general southerly direction following the coastline of the State and of the Florida Keys and three geographical miles seaward therefrom to a point in latitude 24 degrees 35 minutes north which is three geographical miles westwardly from the coast of the most westerly of the Marquesas Keys; thence due west in latitude 24 degrees 35 minutes north to a point which is three marine leagues westwardly from the most westerly of the Marquesa Keys; thence in a general northerly direction following the coastline of the Marquesa Keys, the lower Florida Keys, the seaward limit of the inland waters of Florida Bay and the coastline of the mainland and three marine leagues seaward therefrom to a point west of the mouth of the Perdido River and three marine leagues distant therefrom; and thence to the mouth of the Perdido River.
>
> Marine boundary of the Dry Tortugas Islands. Beginning at a point in latitude 24 degrees 35 minutes north three geographical miles southeastwardly from the coastline of Garden Key or any low-tide elevation which is southeastward from Garden Key and within three geographical miles thereof; thence in a general westwardly direction following a line three geographical miles seaward from the coastline of the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24 degrees 35 minutes north three geographical miles southwestardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence due west in latitude 24

degrees 35 minutes north to a point in longitude 83 degrees west; thence due south in longitude 83 degrees west to a point three marine leagues southwestwardly from Loggerhead Key or any low-tide elevation which is southwestwardly from Loggerhead Key and within three geographical miles thereof; thence in a general northwestwardly, eastwardly, and southwardly direction following a line three marine leagues seaward from the nearest of the Dry Tortugas Islands and low-tide elevations to a point in latitude 24 degrees 35 minutes north; and thence due west in latitude 24 degrees 35 minutes north to the place of beginning.

7. That the Master erred wherein he found that the body of water bordered on the south by the Florida Keys, on the northeast by the mainland and on the northwest by a line north 045 degrees east drawn from the Dry Tortugas Islands to the mainland, referred to by the State of Florida as Florida Bay, is not historic waters or an historic bay; or, in the alternative, he erred where he found the area encompassed by a closing line drawn from the East Cape or Cape Sable to the Spanish banks low-tide elevation northeast of Spanish Key is not a juridical bay.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 52, ORIGINAL

UNITED STATES OF AMERICA,
Plaintiff,

-v-

STATE OF FLORIDA,
Defendant.

BRIEF IN SUPPORT OF EXCEPTIONS

INTRODUCTION

The State of Florida has filed seven exceptions to the Master's Report bearing date of January 18, 1974 filed in this cause. the exceptions are grounded on the contention of defendant that the Master's findings of fact, as related to the exceptions, are unsupported by any substantial evidence or are contrary to the clear weight of the evidence and/or based on a mistaken view of the controlling law, and request this Court to reject said report as excepted.

The history of this case is accurately stated on pages 1 through 6 of the Report of the Master and the State of Florida, hereinafter referred to as "Florida," does not dispute such statement; however, Florida wishes to emphasize that as a condition of the stipulation for severance filed with this Court, Florida is entitled to any relief afforded the several defendants in *U. S. v. Maine*, et al, 35 Original, and rest on this condition

to request by separate motion this Court's indulgence in postponement of a decision in the matter *sub judice* until the Court may simultaneously rule in the *Maine* case.

The parties are referred to as they appeared before the Master or by name. Reference to the Master's Report is made by the abbreviation (MR). Reference to the Transcript of Testimony is made by the abbreviation (TR).

This brief will argue the exceptions to the Master's Report by subject matter rather than by itemized exceptions because of the inter-relationship of one issue to another and such presentation seems more logical to the development of Florida's case.

ARGUMENT

Point I

Exceptions to the Legal Premise Upon Which the Master Approached Issues

I.

Neither the California Doctrine Nor the Submerged Lands Act Is Properly Applied by the Special Master

A. The doctrine announced in United States–vs–California is inappropriate to the instant case.

> *"It is upon that basis, Mr. President, that I believe, as a representative of the State of Michigan, that we in Congress should wait and not pass this legislation until the Supreme Court of the United States decides the specific instant case before it, which deals with the ownership of the 3-mile marginal sea off the coast of California. It has nothing to do with the Great Lakes. It has nothing to do with what the ownership of the Thirteen Original States might be. It will solve one problem. It will solve the question of the ownership of the lands off the coast of California which we acquired by purchase from Mexico. The whole question involved . . . is: What did we purchase from Mexico?"*[1]

> *"Later, the court expressly pointed out that the Doctrine of United States v. California . . . is applicable to all coastal states.*[2]

The California Doctrine is appropriate to the instant case only if the National Government asserts a 'paramount right' (332 U.S. at 36) to the seabed within Florida's offshore boundaries. Florida does not understand this to be the Government's claim. That issue was settled conclusively almost a decade

[1] Senator Ferguson in debate on whether to quit-claim marginal seas via H. J. Res. 225, which passed the Congress and was promptly vetoed by President Truman; from Congressional Record, July 22, 1946, p. 9623.

[2] Report of the Special Master, pg. 10.

before this case was filed. See, *United States -vs- Florida*, 363 U.S. 121 (1960) (No. 9 Original). Therefore, Florida takes exception to a discussion of paramount rights within the marginal seas; such is not at issue.

Rather, the 'whole question' here arises from a challenge by the National Government to Florida's territorial integrity. The challenge comes about by the simple expediency of denying the State's historical boundaries. The question is not what happens within them, but where are they?

Questions underlying this core issue evoke dicta from several cases, and it may be that Court comment in *United States -vs- California* will be helpful in treating these questions. But this is not an occasion in which ponderous questions of war and peace and international commerce must be resolved in the ruling. This is, rather, an occasion for considering *boundaries;* a quiet issue compared to that at Bar in *California*. It is a domestic matter, with consequences municipal instead of international. The nature of the case, then, makes application of the heavy California Doctrine not only unnecessary, but erroneous.

In the California Case, the cause for concern was a question of who, as between the State or National Government, was to hold the key to development and exploitation of natural resources beneath the marginal sea. California's claim was based upon an historic three-mile boundary described in the 1849 Constitution effective when it joined the Union. The question of its Constitutional boundary was broached, passed quickly by, and ignored in the rationale of the case. The marginal sea was not treated as being within State boundaries, but as a three-mile strip adjacent to the coast. For all practical purposes, the opinion deemed California's boundaries to have stopped at the shoreline. This is a crucial distinction between *United States -vs- California* and the present case.

Here we begin with the presumption that, included *within state boundaries* is certain territory seaward of the beach which the complainant asserts, and the Special Master apparently agrees, to be subject to exclusive disposition by the National Government for reason of its navigable surfaces and its seaside locus.

This assertion is a restatement of the California Doctrine. Yet the core of the California Case is conspicuously absent. It was removed by this Court in No. 9 Original. That Florda has marine boundaries situated seaward of its coast was decribed in its 1868 Constitution, considered and approved by Congress, recognized at least inferentially by a lower Federal court, *Pope -vs- Blanton*, 10 F.Supp 18 (ND Fla. 1935), dismissed on other grounds 299 U.S. 521 (1937), and expressly recognized by this Court in United States -vs- Florida, *supra*.

In *California*, this Court found without benefit of an evidentiary hearing that the State had failed to assert *dominium* in the three-mile limits of its marginal sea (even though it had for nearly 20 years sold petroleum leases there without comment from National agencies until the late 1930's). "The first claim to the marginal sea was asserted by the National Government. We held that protection and control of [the marginal sea] were indeed a function of national external sovereignty." *United States -vs- Texas*, 339 U.S. 707, 711-712 (1959). There is little doubt but that the Court considered the California Case to be cast in terms of emphasis upon national sovereignty. At 332 U.S. p. 29:

> • • • The United States here asserts rights in two capacities transcending those of a mere property owner. In one capacity it asserts the right and responsibility to exercise whatever power and dominion are necessary to protect this country against dangers to the security and

tranquility of its people incident to the fact that the United States is located immediately adjacent to the ocean. The Government also appears in its capacity as a member of the family of nations. It asserts that proper exercise of these constitutional responsibilities requires that it have power, unencumbered by state commitments, always to determine what agreements will be made concerning control and use of the marginal sea and the land under it. . . . In the light of the foregoing, our question is whether the state or the Federal Government has the paramount right and power to determine in the first instance when, how, and by what agencies, foreign or domestic, the oil and other resources of the soil of the marginal sea, known or hereafter discovered, may be exploited.

That such is not the nature of the instant case is amplified in *United States -vs- Louisiana*, 339 U.S. 699 (1949), where, at 704 the Court applied the California Doctrine to a definition of extended rights in the marginal sea assumed by Louisiana:

> • • • As we pointed out in United States v. California, the issue in this class of litigation does not turn on title or ownership in the conventional sense. California, like the thirteen original colonies, never acquired ownership in the marginal sea. The claim to our three-mile belt was first asserted by the national government. Protection and control of the area are indeed functions of national external sovereignty. . . . The marginal sea is a national, not a state concern. National interests, national responsibilities, national concerns are involved. The problems of commerce, national defense, relations with other powers, war and peace focus there. National rights must therefore be paramount in that area.
>
> That is the rationale of United States v. California. • • •

The present case, then, does not fall within that 'class of litigation'. *United States -vs- Florida*, 363 U.S. 121 (1960) [No. 9 Original] did fall into that class of litigation, however, and this Court held that the Submerged Lands Act of 1953 (43 USC § § 1301 *et seq*) controlled the issue, reaching a different result than the California and Louisiana cases. Although one aspect of this case is meant to define with greater particularity the boundaries approved by the decree in No. 9 Original (see Report of the Special Master, p. 2), and thus be supplemental to it, the *nature* of the issues is not the same.

While the Court in No. 9 Original agreed that Congress approved Florida's three-league Gulf boundaries after its admission into the Union and before passage of the Submerged Lands Act, it expressly did not decide the extent and location of those boundaries (363 U.S. at 123). Nor did it attempt definition of the Atlantic boundary, or consider the geographical line demarcating the Atlantic Ocean from the Gulf of Mexico. The Court's interest was focused squarely upon the effect of the Submerged Lands Act upon the California Doctrine as applied to the State of Florida.

The *substance* of the conflict described in the California Case was decided in Florida's favor. The geographical *form* that result would take was as described in Florida's 1868 Constitution. Detailed magnification of that *form* was to be the subject of this proceeding. Yet echoes of the California conflict continued to influence the Special Master in his approach to locating with particularity the State's boundary (see, Report of the Special Master, Section B 2, pp. 8-11). Florida respectfully takes exception to this application of the California Doctrine.

Whether war powers, authority over interstate and foreign commerce, or authority in international relations may be exexercised by the National Government within Florida's boundaries, marine or dry land, has never been at issue. These are

the paramount powers described in the California Case, and they may be appropriately exercised by the National Government in any part of any state at any time if they may be exercised at all.

But because they may be 'paramount' in Lake Okeechobee does not mean that Florida cannot regulate fishing therein or the taking of minerals from its bottom. See, *Coastal Petroleum Company* vs. *Secretary of the Army, et al*, 318 F. Supp. 845 (S.D. Fla. 1971).

That the Secretary of the Army may prescribe regulations for navigable use of the St. Johns River does not mean that the State of Florida has ceded that waterway to the National Government (See, 33 U.S.C. § 1 and regulations promulgated thereunder).

That the United States Navy, pursuant to authority delegated under 33 U.S.C. § 3 closed inland waters, vast areas of Florida Bay, and waters in the Florida Keys to all vessels in order that fleet aircraft could engage in live strafing, bombing practice, and gunnery range operations does not mean that these areas are no longer to be included within the State of Florida. (See, 33 C.F.R. § § 204.82, 204.85, 204.86, 204.90, 204.95, *et seq.*)

Paramount powers described in *United States* v. *California* are indeed applicable to all coastal states, and to all non-coastal states as well. But it does not follow that, by virtue of the exercise of this paramount power by the National Government, the State of Florida has surrendered its *eminent domain* over all of the territory within its boundaries. *Pollard's Lessee* -vs- *Hagan*, 3 Howard (U.S.) 212, 223 (1845).

Nor does the instant case sound in terms strictly of title to or ownership of real estate. Certainly, Florida's territory is not something it can *convey*. Florida no more owns its marine territory in fee simple absolute than it does its statehood, its

elected cabinet system of government, or its tourist economy; all are integral parts of the whole. Thus it is not so much a question of what the State of Florida *owns* as it is an inquiry into what the State of Florida *is*.

The State is a political, economic, and geographic unit. It is a member of a Union of similar units, and it has surrendered certain of its sovereignty to that Union as an expression of its interdependence. *Carter v Carter Coal Co.*, 298 U.S. 238, 295 (1935); *Keith v Clark*, 97 U.S. 454 (1878); *Texas v White*, 7 Wall (74 U.S.) 700,721 (1868); *Lane County v Oregon* 7, Wall (74 U.S.) 71, 76, (1868); *McCulloch v Maryland* 4 Wheat. 316, (1819).

But that it has not surrendered all of its sovereignty is the key to the success of that Union. Florida retains and enjoys a certain political and economic integrity coextensive with, and sometimes exceeding, its geographic limits, *Skiriotes -vs- Florida*, 313 U.S. 69 (1940). To the extent that its territorial integrity is subject to divestiture by the Congress or the National judiciary, so too is its political and economic integrity subject to diminishment. This Court has recognized these prnciples in cases past. *Utah v United States*, 403 U.S. 9, (1971); *Coyle v Smith*, 221 U.S. 559 (1910); *Central R.R. Co. v. Jersey City*, 209 U.S. 473, 479 (1907); *Louisiana v Mississippi*, 202 U.S. 48 (1905).

Concepts of Federalism announced in *Pollard's Lessee -vs- Hagan*, 3 *Howard* (U.S.) 212 (1845) bear repeating:

> The right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the State, is called the eminent domain. It is evident that this right is, in certain cases, necessary to him who governs, and is, consequently, a part of the empire, or sovereign power. (Vat. Law of Nations, Sec. 244) This definition shows that the eminent domain, although a sovereign power, does not include all

sovereign power, and this explains the sense in which it is used in this opinion.

• • • This right of eminent domain over the shores and the soils under the navigable waters for all municipal purposes belongs exclusively to the States within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be weilded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For although the territorial limits of Alabama have extended all her sovereign power into the sea, it is there, as on the shore, but municipal power, subject to the Constitution of the United States, "and the laws which shall be made in pursuance thereof."

• • • The shores of navigable waters, and the soils under them were not granted by the Constitution to the United States, but were reserved to the States respectively.

It is not enough to say that the rule of *Pollard's Lessee* was limited by the California Case to inland areas of the State, and that therefore it is inapporpriate here. For it is the Califronia Doctrine that limits Pollard's Rule, and the Court's recognition of the fact of Florida's historic seaward boundary in No. 9 Original precludes application of the *California* rationale in this case.

Underlying the Special Master's conclusion that Congress, by the Act of June 25, 1868 (15 Stat. 73), did not approve rights to the seabed within territorial waters described in Florida's 1868 Constitution, is a strong and controlling reliance upon the California Doctrine. Florida submits that this reliance is misplaced, and respectfully takes exception thereto.

B. *The Submerged Lands Act did not re-write Florida's historic boundaries.*

> *"Until recently, the Federal Government never thought it owned these lands, and even until now it has never possessed or used them. The lands are still in the possession of the States . . . The passage of the pending proposed legislation will simply permit the States to keep what they have always had since the foundation of the Union."*[8]

In 1868, Congress approved Florida's Constitional boundary "along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland • • • " These calls descibe a continuous, uninterrupted territory. Although a boundary call "along the edge of the Gulf Stream and Florida Reefs" needs more particularity in description, a boundary "to and including the Tortugas Islands" is definitive enough to clearly express a continuing boundary.

Yet the Special Master has concluded that, since the Submerged Lands Act limits boundaries in the Gulf of Mexico to three marine leagues from shore, the 1868 boundary is no longer valid, for the Tortugas Islands tip of the Florida Keys lies too far from the Marquesas, the nearest landward Key. Hence, in a direct confrontation between an unequivocal, unambiguous call in Florida's historical boundary (approved

[8] Senator Daniel in debate on the Submerged Land Act, 99 Congressional Record 2830.

by Congress), and application of the Submerged Lands Act, the Special Master has ignored the intent of Congress set out in Section 3 (a) to recognize and confirm *existing* historical boundaries, and set the Tortugas adrift. Report of the Special Master, pp. 33-36.

This confrontation should have been decided in favor of the State's historic boundary, as, indeed, it could have been, by treating the Florida Keys as a continuing shoal area (as it was in 1868, described *infra*), and by recognizing that there is no authority for the proposition that a State cannot have marine boundaries. In fact, it can have total marine boundaries without offending any concept of domestic or international law.

In a dispute as to which State, Mississippi or Louisiana, owned certain islands in the Gulf of Mexico within the geographic limits defined in both their admission Constitutions, this Court considered that Louisiana had been admitted first, and that Court and Congress were powerless to diminish Louisiana's territory once statehood had been achieved.

> The islands, marsh or otherwise claimed by Louisiana in this case were all within 3 leagues of her coast. The act admitting Mississippi was passed five years after the Louisiana act, yet Mississippi claims thereunder the disputed territory, as being islands within 18 miles of her shore. If it were true that this repugnancy between the two acts existed, it is enough to say that Congress, after the admission of Louisiana, could not take away any portion of that state and give it to the state of Mississippi. The rule, *Qui prior est tempore, portior est jure,* applied, and § 3 of art. 4 of the Constitution does not permit the claims of any particular state to be prejudiced by the exercise of the power of Congress therein conferred.
>
> (*Louisiana -vs- Mississippi,* 202 U.S. 1, 39-41 (1905)

If article 4, Section 3 of the Constitution precludes congressional diminution of the territory of the State of Louisiana, it logically follows that all States are similarly protected, and that the Article 4 inhibition applies to laws taking State territory for purposes of the National Government as well as for purposes of another state. This protection must go to judicial interpretation as well as to acts of Congress. See, generally, *State -vs- Muncie Pulp Co.*, 119 Tenn. 47, 104 SW 437 (1907); and cases involving disputes: *Oklahoma v Texas*, 272 US 21 (1926); *New Mexico v Colorado*, 267 US 30, (1924).

It is for this reason that the State of Florida respectfully excepts from application by the Special Master of the Submerged Lands Act to lop-off the Tortugas Islands from the tip of the Florida Keys, and to otherwise diminish the territorial integrity of the State.

Misapplication of the Submerged Lands Act and the California Doctrine to his approach to issues under consideration here, led the Special Master to error. Exceptions to specific geographical calls and treatment of other areas of Florida's historic boundary follow in Point II.

POINT II

The Specific Findings and Exceptions

1. *Florida's Boundary*

It is appropriate, because of its relevance to every aspect and theory of Florida's case, to first consider Florida's boundary contained in Article I of Florida's 1868 Constitution, which is not only Florida's historic boundary[4], but its only lawful boundary, since it is the last Constitutional boundary provision approved and ratified by Congress, and, as construed by Florida, exceeds three nautical miles in both the Atlantic Ocean and Gulf of Mexico.

The relevant portion of the 1868 Constitutional boundary description is as follows:

> • • • then down the middle of said river [St. Mary's] to the Atlantic Ocean; thence southeastwardly along the coast to the edge of the Gulf Stream; thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands; thence northeastwardly to a point three leagues from the mainland; thence northwestwardly three leagues from the land • • •.

A. *Then down the middle of said river to the Atlantic Ocean, thence southeastwardly along the coast to the edge of the Gulf Stream*

"Down the middle of said river" is not ambiguous and the words speak for themselves. However, "To the Atlantic Ocean" is unclear when considered in context with the following call. "Thence southeastwardly along the coast to the edge of the

[4] *U.S. v. Florida*, 363 U.S. 212 (1960).

Gulf Stream" raises several questions. Taking the undisputed fact that the Gulf Stream does not ordinarily touch the coast line[5] of Florida as true, the questions are:

(1) Where along the coast line does one leave the shore to reach the edge of the Gulf Stream to make a southwestwardly turn?

(2) What does "along" mean, i.e., near or by the shore, or on the shore?

(3) Did the drafters of the 1868 Constitution intend for Florida to have a marine boundary in the Atlantic considering what "along" may mean?

(4) What does "southeastwardly" mean in terms of true compass heading?

Florida contends that in construing the boundary provision it should be given a reasonable and logical construction taken as a whole, that is, one call should give meaning to another to clarify the actual words employed by the drafters. Words should not be added or taken away or given other than ordinary meaning.

The Master on page 22 of his report holds "along the Coast" to mean coincident with the coastline and follows the low-water line along the Coast. Accordingly, the Master construes this segment of the boundary as follows:

> "I conclude that a proper application of the Constitutional language requires that the general heading of this final section of the boundary along the low-water mark of the coastline should be followed by the boundary in the same southeastwardly direction until it reaches the 100-fathom line at the western edge of the Gulf Stream."

[5] "Coast line" as used in the text has the same meaning as defined in Title 43 U.S.C. § 1301 (c).

"Along the coast" has no specific meaning standing alone. Ironically, the Master, on page 42, uses the phrase "along the coast of Florida" to mean a belt of marine territory parallel to the coast. Nevertheless, the key to the meaning of "along the coast" lies in the meaning of "to the Atlantic Ocean." Florida's witness[6] gave the phrase its logical and practical meaning. The witness concluded that "to the Atlantic Ocean" meant to the last sea buoy marking the high seas and gave the phrase "along the coast" the meaning of parallel to the coast which, as the Master should agree, is not an unusual meaning.

The witness, a trained and experienced navigator, stated that he considered the 1868 boundary article as a navigator utilizing charts in probable usage in 1868 and testified beginning at TR 306:

> "I will start my construction of the boundary description by making the observation that it is clear one must leave the shoreline to find that point on the Gulf Stream where a turn is made southwestwardly to follow the Gulf Stream and Florida Reefs in the Straits of Florida, because the Gulf Stream never appears from the charts to touch the shores of Florida in the Gulf or Atlantic.
>
> . . .
>
> Keeping this in mind, in construing "down the middle of St. Mary's River to the Atlantic Ocean, "I would proceed to the last ocean bouy at the mouth of the St. Mary's as shown on United States Exhibit No. 7, which bouy appears to be two and one-half to three miles from the mouth of the river.
>
> . . .

[6] Major John D. Adrington.

Proceeding to this point seems logical to a navigator because this point should be cleared to proceed along the coastline. It may be noted that this bouy point approximates the 10 fathom contour.

. . .

Again I might point out proceeding to sea at the mouth of the St. Mary's River is logical because the mouth gives natural access to the ocean and "to the Atlantic Ocean" is the last fix before the call to proceed to the edge of the Gulf Stream.

In other words, the Constitution gives no other instructions as to how to reach the edge of the Gulf Stream by proceeding east or southeast at any subsequent point on the Coast, and the mouth of the St. Mary's River is a natural place to head to sea.

. . .

In construing "thence southeastwardly along the Coast to the edge of the Gulf Stream, "as I stated, I would proceed to the last ocean buoy at the mouth of the St. Mary's River, then turn and follow the 10 fathom contour which parallels the general trend of the coastline in a southeastwardly manner.

In my opinion, the language "along the coastline" suggests a parallel course.

Also, following the 10 fathom contour would allow one to follow general compass headings which are within the allowable limits of the stated heading "southeastwardly."

The headings are acceptable, because, as a navigator, if someone directed me to head southeast, I would head 135 degrees, but if someone directed me to head southeastwardly to a point, I would assume my destination fell somewhere between 112½ degrees and 157½ degrees.

I would follow the 10 fathom contour as shown on U.S. Exhibit No. 10 southeastwardly to the point where the coast of Florida takes a southwestwardly turn and where the 10 fathom contour line and the Gulf Stream appear to the eye to meet. It may be noted this point is perpendicular to the Lake Worth Inlet.

The 10 fathom contour line appears on U.S. Exhibit No. 10 to be a fairly straight line paralleling the coast in a natural fashion much like the Florida Reef line appears on the exhibit in the Straits of Florida.

It is inconceivable that the drafters of the 1868 Constitution would provide for a marine boundary along the entire coast of Florida except for two-thirds of its Atlantic Coastline.

The Master's holding in regard to Florida's Atlantic boundary is contrary to the evidence presented by both parties and is thus an unfounded and arbitrary finding of fact which must be held to be error.

B. *Thence southwestwardly along the edge of the Gulf Stream and Florida Reefs to and including the Tortugas Islands*[*]*; thence northeast to a point 3 leagues from the mainland.*

The Federal Government contends that the call Northeastwardly to a point three leagues from the mainland means to first go East or even Southeast[7] from the Tortugas to the Marquesas then follow the 3-fathom line in a northeastwardly fashion until a point 9 nautical miles from the mainland is

[*] There seems to be no serious conflict between the Parties or the Master as to this portion of the call.

[7] TR 110, 111, and 216

reached.[8] The master agrees that the call commences East or Southeast, but follows a 3-league belt.

The Master construed the call to mean (MR, P. 28):

> . . . It is permissible to infer that the northeastwardly line was itself intended to run three leagues from the Dry Tortugas and the coast of the Keys and the seaward limit of inland waters to a point three leagues from the mainland. . . "

The Master's opinion seemingly rests on three indicia: (1) historic use of shallow waters; (2) compelling language in the 1962 Amendment to the Florida Constitution; (3) three leagues is the only specific Constitutional claim in the Gulf; and (4) forfeiture by Florida because of the 1962 Constitutional Amendment.

The Master's construction is illogical and contrary to the plain meaning of words.

The basis of the Master's contention, taking the evidence as a whole, is that the shallow water area was the area utilized by Floridians in 1868 and the only area Florida would be interested in enclosing within its boundaries.[9]

The actual utilization of Florida Bay in terms of water depths correlated to specific dates in history is unclear and inconclusive by all accounts of the evidence by either party. For example, consider the testimony of Dr. DeVorsey at TR 250:

> Q. In other words, 1870 is not necessarily an accurate date. It could have been several years or even as many as five or six years before that date. Is that possible?

[8] See U.S. Post-Trial Brief at Page 47.
[9] Master's Report, p. 27.

A. Possible.

A better approach than historic private usage for construing the boundary in the area is to determine what was intended to be claimed by the drafters of the 1868 Constitution.

Dr. Tebeau suggests that Floridians of the period were aware of resources in the deeper waters of Florida Bay which they referred to as unexplored or undeveloped areas, and conceivably had an interest in claiming the area (TR 515).

Interestingly, it was stated in *I Kent, Commentaries on American Law 30:*[10]

> "Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume, for domestic purposes connected with our safety and welfare, the control of the waters on our coasts, though included within lines stretching from quite distant headlands, as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of the Delaware, *and from the south cape of Florida to the Mississippi.*" (Emphasis supplied)

A. Yes. "To overcome this difficulty the sponge glass or water telescope was introduced at first with a pane of glass in one end, but afterwards an ordinary wooden pail with a glass bottom substituted for the wood. The device is said to have been employed first about 1870 or a little before and correlated with its use came other changes."

Dr. DeVorsey in reference to the Kent's Commentaries testified at Pages 219 and 220 of the transcript of record:

[10] See Shalowitz, *Shore and Sea Boundary,* Volume One (1962) at 29, fn. 21. The date of publication of the "Commentaries" is 1832, but the Treatise undoubtedly articulate concepts formulated substantially prior to that date.

Q. Do you believe the drafters, as well informed men, may have had knowledge of such rightful claims (to a closing line from South Cape of Florida to the Mississippi)?

A. This is possible. Some of them were attorneys.

Q. Do you think it absurd that they would attempt to enclose Florida Bay by a 45 degree line from the Dry Tortugas to the mainland?

A. I do not think it was absurd.

It is not unusual for a coastal sovereign to claim marine territory prior to actual usage which depends on technological capability. For example, in 1945 President Truman by executive proclamation claimed the resources of the vast Continental Shelf for the Federal Government and Congress provided for the administration of those resources by virtue of the Outer Continental Shelf Lands Act of 1953.[11] However, the Federal Government is not exploring the entire Continental Shelf nor does the state of technology permit exploration at this moment, 29 years after Truman's proclamation of claim.

The best way to construe, indeed, if construction is required, "Northeastwardly to a point" is to consider such language standing alone and its implication.

In considering "thence northeastwardly to a point three leagues from the mainland" the call must be considered an absolute heading of 045 degrees east, because there are no geographical directions included in the call to be followed. Unlike any other call included in the boundary description under consideration, the "northeastwardly" call is not modified in course or direction by additional language.

[11] See fn. 43 infra.

The Master in the application of "usage" in his construction of "northeastwardly to a point three leagues from the mainland" for his contention that a three league belt should be initially followed southeastwardly from the Tortugas, arbitrarily *adds* a geographical call where none existed to predominate over an otherwise unambiguous compass heading.

This Court in *M'Iver's Lessee v. Walker,* 4 Wheat (U.S.) 444, (1819) held that if there is nothing in the description of a boundary to control the call course and distance, the course must be determined according to magnetic meridians. Several states in construing the meaning of generalized courses have held that specific meridians should be followed. For example, the Supreme Court of California in the case of *Currier v. Nelson,* 96 Cal. 505, 31 P. 531 (1892), considering the term "northerly" in a grant without specific or further suggestion as to whether an east or west course be followed construed the term to mean due north. The Supreme Court of Vermont in *Sowles v. Minor,* 82 Vt. 344, 73 A. 1025 (1909), held that the expression "southerly" or "south" used in fixing a definite course so many degrees west must read "south" where the call is not otherwise controlled by an ascertained monument.

There is no ascertained monument in the call under consideration and the Master erred in supplying a geographical description to create an ambiguity.

The Federal Government in its Brief[12] refers to a Report of the Honorable Albert B. Maris, Special Master in *Michigan v. Ohio,* No. 30 Original, June 30, 1971.

It appears from the Brief's Report of the case that Michigan argued that "the statutory term 'northeast' should be construed to mean in a northeasterly direction, that is, the bearing of a line running to a point somewhere between north and east."

[12] Pages 58-60.

According to the Brief, the Special Master was not convinced, reasoning that "such a bearing would be so indefinite as to be impossible to follow unless a terminal monument at its northeasterly end was so specified in the statute." The Master concluded that the term "northeast" must therefore be interpreted as North 45 degrees East.

The Master was imminently correct, and *Michigan v. Ohio* is, conversely, authority for the instant matter, in that the term "Northeastwardly" standing alone without further reference to geographical locations, either as commencing midpoint or terminal monuments, must be construed to mean Northeast or North 45 degrees East to give the call sufficient definiteness to constitute a boundary.

Dr. DeVorsey, the witness for the Plaintiff agrees at Pages 253 and 254 of the Transcript of Testimony:

Q. If I told you to go Northeastwardly, would you go North?

A. No,

Q. Would you go East?

A. No.

Q. Would you go some direction between those two points?

A. Yes.

• • •

A. I would go somewhere midway between the two, between North and East.

Q. What would that be in a modern compass heading?

A. That would be 45 degrees.

The Master on page 28 of his Report concludes that the 1962 Amendment to the 1885 Constitutional boundary coincides with his interpretation of the Northeastwardly call.

The Master concludes the call in the 1962 Constitutional Amendment which states in reference to the Tortugas "thence Northeastwardly, three leagues distant from the coast line to a point three leagues distant from the coast line of the mainland" is a boundary intended to include only water area within three leagues of land on the Northern side of the Keys. Yet its authors still used the term "northeastwardly" to define the boundary! The Master's conclusion is, at best, inconsistent.

The language clearly means to start three leagues from the coast line of the Tortugas on a northeastwardly course to a point three leagues from the mainland. Any other meaning of the call requires utter disregard for the word "northeastwardly," which is not sound construction.

Moreover, following the Master's call requires one to proceed in "northeastwardly" not at all. Rather, it is necessary that one follow a "southeastwardly" direction from the Tortugas. This defines every rule of construction, requiring that one substitute words of opposing meaning for the definite term used in the Constitutional boundary description.[13]

2. *FLORIDA's HISTORIC BOUNDARY WAS NOT LIMITED BY THE 1962 AMENDMENT TO THE 1885 CONSTITUTION OF FLORIDA.*

The Master contends that if Florida is correct in its contention that Congressional approval of its 1868 Constitution approved Florida's historic rights in the area defined by the

[13] Application of the California Doctrine.

boundary described therein, then Florida forfeited such rights by the 1962 amendment to its 1885 Constitution, which included a different boundary description. (MR 17, 28-29).

Florida disagrees that the 1962 amendment attempted to change, or was intended to modify, Florida boundaries in the Gulf, but was merely a restatement of the Gulf boundaries. In the Atlantic, however, the 1962 amendment reduced Florida's boundary,[14] for which there was no Congressional authority.

Only the boundary contained in the 1868 Constitution has been approved by Congress and only Congress has the power to create states [15] including the extension or reduction of the geographical area of a state once created.[16] This point is made very clear in Section 4 of the Submerged Lands Act where Congress grants to the states permissive authority to extend their seaward boundaries to a line three geographical miles distance from the coast.

Since Section 4 only relates to extending manifest boundaries, the 1962 Amendment, if it had the effect of reducing Florida's boundary, which Florida denies, was a unilateral alteration of the state's boundary, and that alteration has not been recognized or approved by Congress. Therefore, the 1868 boundary redescribed in Florida's 1968 Constitution, continues as the only hsitoric and lawful boundary of the State.

[14] In 1953 the Florida Legislature enacted into law Chapter 29744, Laws of Florida, 1953, stating by preamble that the 1885 Constitutional boundary was "indefinite and not clearly defined" and therefore the Coast line of Florida adjacent to the atlantic Ocean would be constitutionally interpreted as being three geographic miles distance from the Coast line. To the extent the statute attempted to alter the Constitutional boundary in any way, it was unconstitutional boundary even under auspices of the Sumerged Lands Act.

[15] Article IV, Section 3, U.S. Constitution.

[16] The only possible exception to this Congressional power is natural accretion to or reliction of state soverignty lands.

(It must be remembered that Section 4 of the Submerged Lands Act provides for states to extend their boundaries without prejudice to their claim, if any they have, that their boundaries extend beyond three miles.)

The Master's opinion as to the effect of the 1962 Constitutional Amendment prejudiced Florida's historic claim. This application violated terms of and intent of the Act. The Master erred in construing Florida's boundary with reference to the Amendment.

Nevertheless, the Master, through error, finds the Amendment reduced Florida's claim of a boundary north 045 degrees east from the Tortugas to the Mainland (MR, p. 28), and that such reduction must be treated as abandonment (MR, p. 29). The Master must be reversed.

The Complainant cited six cases on Page 33 of its Post-Trial Brief for the proposition that states have authority to cede their jurisdiction to the United States, and acceptance of the National Government is presumed. The Master apparently agrees on Page 28 and 29 of his Report, but without reference to authority. A review of the cases cited indicate that not one is on point or even analogous authority for the position of the Plaintiff. For example, the United States quotes from and relies on *Peterson v. U.S.*[17] The facts in *Peterson* are that in 1940 Congress dedicated and set apart a public park in California. California by specific act ceded exclusive police power jurisdiction of the dedicated area to the Federal Government. The Court held that states could cede such jurisdiction to the Federal Government, but it is clear from the language of the opinion that California's boundary was not diminished by the grant:

[17] 191 F.2d 154 (1951).

> . . . it has been recognized that the ability of the States and the National Government to cooperatively adjust jurisdcition over territory *within their borders* furthers the mutual interest of the people of both states and nations . . . (Emphasis supplied) 191 F. 2d at 157.

In summary, the 1962 Amendment was ineffectual if it is interpreted as an attempt to diminish the hsitoric boundaries of Florida. Accordingly, the amendment being ineffectual for its designed purpose it is ineffectual for all purposes and secession of jurisdiction should not be attributed to so futile an act.

The Court should find on this point, because of its impact on Florida's contention, that Florida is not obliged to rely on the Submerged Lands Act for its claim to submerged lands within its congressionally approved boundary, and the Court should recognize the significance of the ancient boundary in the Gulf of Mexico as it relates to the historic status of Florida Bay. If, however, the Court decides against Florida on the two issues just stated, then a ruling here is meaningless.

4. *FLORIDA'S HISTORICAL INLAND WATER CLAIM*

The Master finds that Florida Bay[18] is not an historic bay principally because Florida failed to carry a burden of proof which is "clear beyond doubt", [MR, p. 46]. The Master abused his discretion by determining Florida's burden of proof was more than a preponderance. Furthermore, the Master's finding in regard to Florida Bay is contrary to the weight of evidence even if Florida must prove its case clear

[18] Florida Bay is construed by the State of Florida to be all waters bounded on the South by the Florida Keys to and including the Dry Tortugas Islands, on the Northeast by the lorida eninsula and on the Northwtst by a line running 045° from the Tortugas Islands to ape Romano.

beyond doubt. He ignored evidence supporting Florida's case, clearly misconstrued evidence considered in his report, and erred in his conclusion of law relative to the criteria required to establish historic title, all of which will be hereafter shown.

A. *Concept of Historic Waters*

Florida claims that Florida Bay is a historic bay or historic waters; thus, inland waters of the State of Florida.

The Convention on the Territorial Sea and the Contiguous Zone[19] provides that waters landward of baselines enclosing bays, including historic bays, shall be considered internal waters.[20] However, historic bays are not defined in the Convention; thus, the U. S. Supreme Court has recognized that the term must therefore derive its content from general principles of international law stating:

> There is no universal accord on the exact meaning of historic waters . . . There is substantial agreement, however, on the outlines of the doctrine and in the type of showing which a coastal nation must make in order to establish a claim to historic inland waters.[21]

The leading modern case on the nature, characteristics and significance of historic waters is *United Kingdom v. Norway*[22] better known as the Fisheries Case, and referred to as such hereafter. Under the authority of *The Paquete Habana*,[23] the Fisheries Case is the law of the case, the Court having said:

[19] Adopted April 27, 1958 (U.N. Doc A/Conf. 13/L.52) and ratified by the United States on March 24, 1961. See 15 U.S.T. (Pt. 2) 1606.

[20] Florida and the United States have stipulated that the determination of the coast line not otherwise agreed upon shall be governed by pertinent articles of the Convention. See Joint Pre-Hearing Statement dated September 1971 excuted by Ervin N. Griswold, Solicitor General of the United States and Robert L. Shevin, Attorney General of the State of Florida.

[21] *U.S. v. Louisiana* 394 U.S. 11 at 74-75 (1969).

[22] (1951) International Court of Justice, Rep. 116.

[23] 175 U.S. 677 (1899).

> International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjcets of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Hilton v. Guyot*, 159 U.S. 113, 163, 164, 214, 215.

In the Fisheries Case of 1951, the International Court of Justice considered the concept of historic waters. The Court gave the following definition: ". . . . 'historic waters' are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic titie."[24] Historic title has been traditionally claimed in respect of certain bays; however, the theory does not apply to bays only but is more general in scope.[25] In fact, a second memorandum[26] on historic waters prepared by the United Nations Secretariat published in 1962 stated in conclusion at paragraph 183:

> In the first place, while "historic bays" present the classic example of historic title to maritime areas, there seems to be no doubt that, in principle, a historic title may exist also to other waters than bays, such as straits or archi-

[24] (1951), International Court of Justice, Rep. 130.

[25] See Memorandum prepared by the UN Secretariat on Historic Bays: Doc. A/Conf. 13/1 (1957), Page 2.

[26] Juridical Regime of Historic Waters, Including Historic Bays: UN Doc. A/CN. 4/143 (1962).

pelagoes, or in general to all those waters which can form part of the maritime domain of a state.

The doctrine of historic waters serves as a fundamental rule of international law,[27] and serves as a protective measure for those states having large bays closely linked with the land and traditionally considered by those states as part of their territory. Logically, this is so because of vital importance to economic growth and national security of the subject states.

The concept of historic waters however should not be considered a regime of exception to the general rules of law relating to delimitation of the maritime domain of a state.

In a study on historic bays, Bourguin developed this line of thought:[28]

> If it is agreed that the solution given by ordinary law to the problem of the territoriality of bays is not a matter of a mathematical limitation of their width but depends on an appreciation of the various elements that make up the character of the particular bay, the notion of "historic titles" assumes a meaning that is quite different from that given it by those who favour the ten-mile rule. *"Historic title" no longer has the function of making an otherwise illegal situation legitimate. It is no longer a means whereby the coastal State can include a part of the high seas in its domain. It is no longer connected with the idea of usucaption. It is one element along with others characterizing a particular state of affairs, whcih must be considered as a whole and its various aspects.* (Emphasis Supplied)

The authors of the latest United Nations Treatise on historic

[27] See Arts. 7 and 12, Convention on Territorial Sea and Continguous Zone; Also see "Fisheries" Case.

[28] Bourguin "Les Baies Historiques" in Me'langes Georges Sauser-Hall (1952) quoted in UN Doc. A/CN. 4/143 at Page 25 (U.S. Ex. 100).

waters seem to agree that historic title is not an exception to the general rules of international law:[29]

> . . . it may be pointed out that there seems to be certain difficulties inherent in the view that title to "historic waters" is an exception to the general rules of international law regarding the delimitation of the maritime domain of the State and that such title therefore must be based on some form of acquiescence on the part of the other States. If such general rules exist and whatever their contents may be, they must obviously be customary rules. When the Geneva Convention on the Territorial Sea and the Contiguous Zone comes into force and is widely ratified, this situation will change to a certain extent. For the present, however, the general rules in this field from which the regime of "historic waters" would be an exception could only be customary rules. This means that both the general rules and the title to "historic waters" would be based on usage. Why then should the latter be considered as exceptional and also inferior with regard to its validity, so that the acquiescence of the other States would be necessary to validate the title? The facts on which the title to "historic waters" are based belong to the usage in this field, no less than the facts on which the general customary rules would be based. And the *opinio juris* exists in the case of "historic waters" just as much as in the case of the so-called general rules.

It has been pointed out that there are certain common features between the concept of historic waters or historic rights in general on the one hand, and the concepts of custom, prescription, and occupation, on the other.[30] All such concepts presume that the resulting rights and titles have been

[29] Juridical Regime of Historic Waters, Including Historic Bays, Supra fn. 26.

[30] See MacGibbon, 'Customary International Law and Acquiescence' (1957), 33 Brit. Yearbook Int'l Law 114, at 119-21. Also see U.N. Doc. A/CN. 4/143 at 31-34.

preceded by two elements; a constant practice or exercise of state authority, and a toleration or acquiescence on the part of other states, particularly those directly concerned or affected by the practice in question. However, as properly pointed out by Norway in the Fisheries Case, the common features and process of development must not be exaggerated, for this could have important consequences on the burden of proof. For instance, acquisitive prescription generally gives the impression that there must be some adverse holding on the part of the claimant. This can hardly be the case when a state claims to have an historic title to a water area. Indeed, it is somewhat incompatible with the idea that the exercise of authority by the claimant state must have been peaceful. Perhaps there is more affinity between the concept of historic waters and that of occupation as a means of acquiring title.

As is well known, occupation is an original mode of acquisition of territory. It is defined by Oppenheim as follows:

> Occupation is the act of appropriation by a State by which it intentionally acquires sovereignty over such territory as is at the time not under the severeignty of another State.[31]

A similar definition is given by Fauchille:

> Generally speaking, occupation is the taking by a State, with the intention of acting as the owner, of something which does not belong to any other State but which is susceptible of sovereignty.[32]

It is the contention of Florida that its claim of historic title is based on occupation of Florida Bay.

[31] Oppenheim, *International Law*, Volume 1, 8th ed. (1955), page 555. Also see U.N. Doc. A/CN. 4/143 at 31-34.

[32] Fauchille, *Traite de droit international public*, Tome 1er, 2e Partie, 8e (1925), pages 680-681. Also See U.N. Doc. A/CN. 4/143 at 31-34.

It is fairly well established that historic waters have the status of internal waters. As for the 1958 Territorial Sea Convention, it does not expressly state that historic waters have the status of internal waters but it does provide that the waters enclosed in a bay shall be considered as internal waters[33] and that waters claimed by "historic title" may affect the delimitation of the territorial seas between opposite or adjacent Coast.[34] Furthermore, in the Fisheries Case, the Court held specifically that the waters of the Vestford can only be regarded as internal waters.[35]

The Federal Government does not challenge the concept of historic waters or that such waters are internal. Indeed it would be estopped to do so, for at the 1930 Conference on the Codification of International Law the United States delegation submitted:

> Waters, whether called bays, sounds, straits, or by some other name which have been under the jurisdiction of the Coastal State as part of its interior waters, are deemed to continue a part thereof.[36]

B. *Florida Bay*

In this portion of its Brief, Florida will relate its evidence to the foregoing statements of law to show Florida possesses historic title to Florida Bay under international law as either a historic bay or historic waters.

Florida Bay is a triangular-shaped bay bordered on the south by the Florida Keys from Key Largo to the Dry Tortugas which historically appear to be a solid land mass (TR 351) attached to the mainland and now connected to the

[33] Article 7, paragraph 4.
[34] Article 12, paragraph 1.
[35] (1951), International Court of Justice, Rep. 142.
[36] Ser. L.O.N.P. 1930, V. 16, Page 107, Quoted in U.N. Doc. A/Conf. 13/1, at 37.

mainland by U.S. Highway No. 1.[37] The Bay is bordered on the west by Florida's historical constitutional boundary which is a 045 degree line from the Tortugas to three leagues from the mainland. The Bay is bordered on the north by the mainland of Florida.

For Florida Bay to be considered a historic bay, the Dry Tortugas must be considered islands forming a multiple-mouth bay and the archipelago known ast he Florida Keys must form one side of the bay, which is lawfully conceptual.[38] Nevertheless, it is not necessary in the determination of Florida's historic title to determine Florida Bay has the geographical characteristics of a bay since "historic waters" is an internationally accepted and unchallenged concept on which to base such title.

Florida Bay is historically a part of Florida. It has had a series of names, and its boundaries were never exactly delineated until the Florida Constitution of 1868, but those boundaries were well established by usage before that time.[39]

Florida has presented in evidence a series of ancient maps and charts to demonstrate a remarkable continuity of Florida Bay by whatever name as a distinctive area with roughly the same boundaries through Spanish, British and American experiences. (TR 415)

The first map presented by Florida is the Jeffery's map of 1763 whch shows Richmond Bay and Chatam Bay as the

[37] U. S. Highway No. 1 stretches from Jewfish Creek to Key West, a distance of 107.6 miles and crosses 63 Keys connected by 42 bridges, none of which span a channel sufficient for navigation by ocean-going vessels with a draft greater than 25 feet. (Florida Exhibit 164, TR 221).

[38] *U. S. v. Louisiana*, 394 U.S. 1 at 60-73. See UN document A/Conf. 13/1 Historic Bays at Page 7 where the Zuyder Zee in Holland is listed in examples of historic bays. The Zuyder Zee is connected by a continuous fringe of islands separated by narrow passages.

[39] TR 414.

designation given the area. The first map to use the designation Florida Bay was the Bache map published in 1854.

Louis Agassiz, a famed Swiss naturalist, commenting on the Bache Survey stated:

> South of the main land, between it and the range of keys, there are extensive flats, which, even at high water, are but slightly covered, and which the retreat of the tide lays bare, leaving only narrow and shallow channels between the dry flats, with occasional depressions of greater depth.
>
> • • •
>
> These mud flats extent not only between the main land and the keys as far as Cape Sable, but may be traced to the north along the western shores of the continuent, and to the west along the northern shores of the keys, not only as far as Key West and the Marquesas, but even to the Tortugas. (See Page 146, Fla. Ex. 47)

For a period of time the area was known as "Bay of Florida."[40] However, Florida Bay is the contemporary designation of the area. The important point, however, is that from the 1760's to now the area has been an identifiable area known to mapmakers, surveyors and explorers of many nations as a bay by one name or another. Even the Federal Government recognizes the area by the name of Florida Bay.[41] It seems only the dimensions, and its *de jure* status are in dispute.

Florida, along with Florida Bay, were first possessed by Spain, then England, and again by Spain; but it was not until Florida became a part of the United States in 1821 that public acts of dominion became significant in the area known as Florida Bay.

[40] See Florida Exhibits 55 and 56.
[41] U. S. Ex. 54; TR 144; U.S. Post-Trial Brief at 68.

The United States acquired title to Florida from Spain by virtue of the Treaty of Amity, Settlement and Limits. Article 2 provides for the King of Spain to cede to the United States:

> . . . in full property and sovereignty, all the territories which belong to him, situated to the eastward of the Mississippi, known by the name of East and West Florida. The adjacent islands dependent on said provinces which relate directly to the property and sovereignty of said provinces . . . .[42]

It is clear that the Treaty would include the Dry Tortugas and the water area between the Islands and the mainland, i.e. Florida Bay.

As early as March, 1822, acting Florida Governor W. D. Worthington informed Secretary of State John Quincy Adams of Florida's concern about foreign fishermen fishing in waters off Florida's coast. (TR 368). Reacting to Worthington's communication, Congress on December 20, 1823, on Motion of Florida's Territorial Representative Richard Keith Call, called on the Committee on Commerce to inquire into the expediency of excluding foreign fishermen from the waters adjacent to the coast of Florida.[43]

By 1825 and thereafter, Federal revenue cutters were patrolling the southwest coast of Florida (TR 369) and arresting foreign turtlers.[44]

The British government through its consulate in New York City on August 9, 1831, requested the United States government for permission to allow English fishermen to fish in Florida waters. (TR 371)

[42] Florida Ex. 71 at 4 and 5.
[43] Florida Ex. 73.
[44] TR 371 and Florida Ex. 74.

Recognizing the special interest of territorial Florida, the State Department, upon the advice of President Jackson, wrote territorial Governor William P. Duval at Tallahassee on August 25, 1831, informing him of the British request (TR 372).

Governor Duval on October 7, 1831, wrote the Secretary of State advising him of the importance of fishing and turtling to Florida and stated generally his opposition to the British request concluding that if the President granted the request as a "courtesy" to the British government that the grant be conditioned on laws to be enacted by the territorial legislature.[45]

The waters referred to by Governor Duval were the sounds, bays and waters contiguous to and between the Islands and Keys and in shallow waters while he made no specific reference to the area of Florida Bay,[46] the size of ships being used were "twenty to fifty tons burdened"[47] which would imply the employment of deep water such as found at the northwest section of Florida Bay.

From what is known from the record about the fishing and turtling practices of the area, it is reasonable to conclude that some portion, if not all of Florida Bay, was considered in Governor Duval's response to the British request.

In consideration of the British request, the territorial legislature conducted an inquiry into the matter of foreign fishing activities in Florida waters. The Committee on the State of the Territory on February 8, 1832, after making its report, passed a resolution seeking Congress to sanction an act entitled "An Act for the Protestation of the Fishing on the Coast of Florida to Raise a Revenue therefrom."[48]

[45] Florida Ex. 75 at 562, 563.
[46] Ibid., at 559.
[47] Ibid., at 558.
[48] Florida Ex. 76 at 6.

The Committee Report stated:

> It has been urged that the law of nations would not justify the appropriation of the fisheries to ourselves exclusively. The Committee would remark, that the British Government had admitted our right to do so, by asking for the use of these fisheries as a favor.[49]

This statement is particularly significant in view of the fact that the Committee understood the law of nations provided for a state's proprietary interest in marine areas such as "little bays" and "gulphs" to extend to three leagues of the shore.[50]

If the Committee did not believe the law of nations would justify appropriation of the fisheries in question exclusively for Florida when the Committee was of the opinion the law of nations provided for a three-league territorial sea, obviously the Committee had a bay or gulf in mind in excess of such distance, undoubtedly Florida Bay.

As stated above, the territorial legislature in 1832 passed Florida's first fisheries law. The Act prohibited any person from taking any fish or turtles on the coast or in any of the seas, bays, creeks, and harbors of the territory without a license.[51]

Congress failed to affirm Florida's fisheries act, but also failed to grant the British permission to fish in the area.

In March, 1845, Florida entered the Union and in December, 1845, the State of Florida passed an act for the protec-

[49] Ibid., at 4.
[50] Ibid.
[51] Florida Ex. 77 at 375-378.

tion of the fisheries on the coast of Florida prohibiting non-residents from taking fish in Florida waters without a license.[52] Florida waters were and are embraced within the territories of east and west Florida ceded to the United States by the Treaty of Amity, Settlement and Limits with Spain.[53]

Historically, Florida Bay has been considered a strategic military area. The Secretary of War reported to Congress in January, 1844, the desirability of fortifying Key West and the Dry Tortugas (TR 387). The Secretary's report was based in large part upon communications received from General Thomas S. Jesup, Quartermaster General of the United States (TR 387, Fla. Ex. 92).

Jesup, stated in the communication:

> Key West, the Dry Tortugas, and Key Biscayne, are the great strategic points on our Southern frontier; they should be strongly fortified. Combined with proper naval means, they would command completely the northern entrance into the Gulf of Mexico, and offered better protection to the Commerce of the whole West and Southwest, than ten times the force in Florida at any other points, or in any other way. (TR 388)

On June 14, 1844, Congress appropriated funds for fortification of the Key West-Dry Tortugas military complex.[54] Once the decision was made to develop the complex, it was necessary to secure clear title to the necessary land and water area. Accordingly, a plat map of the southern portion of Florida was presented to the War Department with a request that the Department designate on the map "by a distinct

[52] This Act was repealed in 1861 and a bill was enacted restricting fishing in Florida waters to others than Florida citizens.
in Florida waters to others than Florida citizens. See Fla. Ex. 84.

[53] Florida Ex. 19, an act for the admission of the States of Iowa and Florida into the Union, 5 Stat. 742-743 (1885).

[54] Florida Ex. 95.

color, the extent of the reservation desired." (TR 389). The map was then to be sent to the White House so that President Polk could issue an executive order establishing the Reservation.[55]

On September 12, 1845, the War Department requested that "all the Islands, Keys and Banks, comprising the group called the Dry Tortugas, with other Islands, or Keys on the Florida coast embraced within the red lines on the enclosed diagram, may be reserved from sale of any kind, till a survey which has been ordered shall have been made, with a view of determining their military relations and properties." State of Florida Exhibit No. 97.

On September 17, 1845, President Polk issued his official order temporarily reserving for military purposes the area included in the line shown on Florida Exhibit 98.

Florida was not adverse to making the land necessary for the complex available. The Florida Legislature, on July 8, 1845, enacted a law "consenting to the purchase of the United States of land for the erection thereon of fortifications and defensive works, and ceding to the United States title and jurisdiction over the same." (TR 390)

The State specifically spelled out, however, that in relinquishing jurisdiction, it was "provided always, and the secession and consent aforesaid, are to be granted upon the specific conditions that this Commonwealth shall retain a concurrent jurisdiction." State of Florida Exhibit 99.

It is obvious that Florida from public acts committed from territorial existence to this moment has persistently protected the economic resources of its waters. For example, in 1893 state statutes were passed prohibiting persons who were not citizens of the United States from taking fish from Florida waters without a license.[56]

[55] Florida Ex. 96.
[56] Florida Ex. 123.

In 1915 the state enacted laws which again insisted that "all fish in the rivers, bayous, lagoons, lakes, bays, sounds and inlets bordering on or connected with the Gulf of Mexico and the Atlantic Ocean, or in the Gulf of Mexico or Atlantic Ocean, within the jurisdiction of the State of Florida, are hereby declared . . . the property of the State of Florida."[72]

Florida since 1957 has absolutely prohibited shrimping by any person whether foreign or national in the Tortugas shrimp beds by virtue of Chapter 57-358, Laws of Florida, 1957.[58] The 1957 Act wa amended in 1961 by Chapter 61-470, Laws of Florida, 1961 to redefine the Tortugas shrimp beds and to creater an additional area. A later amendment, Chapter 70-162, Laws of Florida, 1970,[60] redefined the Tortugas shrimp beds as they exist today.

Clearly, legislation creating the Tortugas shrimp beds and asserting the state's police power therein is a significant act of state dominion over a substantial part of the area known as Florida Bay.

In addition to the police power asserted and referred to above, Florida in 1968 enacted into law the "Florida Territorial Waters Act" which codified as Section 370.21, Florida Statutes:

> 370.21 Florida territorial waters act; alien-owned commercial fishing vessels; prohibited acts; enforcement.—(1) This act may be known and cited as the Florida territorial waters act.
>
> (2) It is the purpose of this act to exercise and exert full sovereignty and control of the territorial waters of the state.

[57] Florida Ex. 124.
[58] Florida Ex. 125.
[59] Ibid.
[60] Florida Ex. 125

(3) No license shall be issued by the division of marine resources of the department of natural resources under §370.06, to any vessel owned in whole or in part by any alien power, which subscribes to the doctrine of international communism, or any subject or national thereof, who subscribes to the doctrine of international communism, or any individual who subscribes to the doctrine of international communism, or who shall have signed a treaty of trade, friendship and alliance or a nonaggression pact with any communist power. The division shall grant or withhold said licenses where other alien vessels are involved on the basis of reciprocity and retorsion, unless the nation concerned shall be designated as a friendly ally or neutral by a formal suggestion transmitted to the governor of Florida by the secretary of the state of the United States. Upon the receipt of such suggestion, licenses shall be granted under §370.06, without regard to reciprocity and retorsion, to vessels of such nations.

(4) It is unlawful for any unlicensed alien vessel to take by any means whatsoever, attempt to take, or having so taken to possess, any natural resource or the state's territorial waters, as such waters are described by Art. II of the state constitution.

In the enforcement of the territorial waters act, Florida has asserted jurisdiction over the entire area herein defined as Florida Bay (TR 437-438).

In regard to the attitude of foreign governments to Florida Bay, Mr. Randolph Hodges, Executive Director of the Department of Natural Resources since 1961, testified as follows:

Q. Mr. Hodges, from your actual knowledge as Executive Director of the Department of Natural Resources

for the State of Florida or from the official records of that Department, can you state whether or not the laws and regulations to which you have testified have ever been challenged by a foreign nation?

A. Florida's marine conservation laws, including its Territorial Waters Act, have not been challenged by a foreign nation or citizen of a foreign nation or citizen of a foreign country, to my knowledge; although foreign nations and their citizens are subject to the rules and laws imposed by Florida Statutes, in regard to protection of Florida's natural resources. I might add, it has not been necessary to exclude foreign nations or foreign vessels from Florida territorial waters except in two instances where Cuban fishing vessels were arrested by the Marine Patrol within three leagues of land.

The reason it has not been necessary to exclude foreign vessels is such vessels are never sighted by the Department's marine patrol although the patrol is very active in the Florida Bay area.

In regard to the vital interest of Florida Bay to Florida, Mr. Hodges testified as follows:

Q. Mr. Hodges, what would be the impact if a court decided that Florida couldn't police shrimping in the Tortugas areas?

A. It would just about wipe out the shrimping industry in Florida, which is a 16-million-dollar-a year industry here. Over fifty percent of the shrimp taken in waters off Florida are spawned in the Tortugas shrimp bed area. If there is no control over shrimping in that area, it will be over-fished and completely depleted. If the shrimp aren't allowed to spawn and grow to maturity, there won't be any left in other waters to be caught.

Mr. Hodges further stated that Cuban vessels, but vessels of no other country have appeared in Florida territorial waters (TR 561-568). These vessels were apparently within an area that even the Federal government would consider territorial seas of Florida (TR 561). However, Florida in its discretion and out of deference to the international situation of the past several years refrained from asserting its police power and relied on Federal authorities under the circumstances.

The best evidence of Florida's willingness to assert her sovereignty in Florida Bay comes from pleading of the United States filed in a presently pending action in the United States District Court, Northern District of Florida.[61] Quoting from the Complaint:

> 1. That certain Cuban fishing boats have been and are engaged in fishing for shrimp in the waters of the Gulf of Mexico in the vicinity of 25.03° north latitude, 82.22° west longitude, more than twelve geographical miles from any part of the coastline of the State of Florida or of the United States, between Cape Romano and the Dry Tortugas.
>
> . . .
>
> 3. That the State of Florida asserts a right to regulate or prohibit fishing in said waters, and immediately threatens to arrest the foreign fishing boats fishing for shrimp therein.

The State of Florida, Board of Trustees of the Internal Improvement Trust Fund which under Florida Statutes holds title to all lands owned by the State by right of its sovereignty and are responsible for administering and protecting those lands (TR 419), on October 4, 1941, leased 3,013,406 acres of submerged land in Florida Bay to private individuals and

[61] *U.S. v. Florida*, Tallahassee Civil Acion No. 1672.

corporations concernel with oil exploration.[62] Actual exploration was conducted in the lease area with at least one deep well of 15,000 feet in depth drilled. This lease eventually expired in 1964 (TR 427).

In summary, beginning in 1941, and continuing for at least 33 years, the State of Florida leased the submerged lands in Florida Bay.

Individuals and corporations thought enough of Florida's title of ownership in Florida Bay to pay considerable sums of money for surveys, drilling and exploration for minerals under such submerged lands. The leasing of Florida Bay was a public act, and no foreign government challenged Florida's right to lease the submerged lands of Florida Bay until the instant litigation.

It is clear from a review of Florida's Exhibits 129, 167 and 168 that the Board of Trustees of the Internal Improvement Trust Fund, which statutorially owns and protects Florida's sovereign lands considered the northwest perimeter of Florida Bay to be a 045° line from the Tortugas to the mainland. The Trustees are the same constitutional officers which comprise the State of Florida, Department of Natural Resources.

Perhaps the most significant aspect of this case in determining the attitude of foreign governments to Florida's claim to historic title in Florida Bay is the absolute absence of any evidence or hint of evidence from the Federal Government that any country has in the past 150 years protested or objected to Florida's overt, active assertion to sovereign claim to Florida Bay.

Highly significant in regard to assertion of sovereignty of Florida Bay is the act of the United States Congress in affirming to the world in 1868 that Florida, one of the States of the Union, had a marine boundary from the Dry Tortugas Islands

[62] Florida Ex. 127, (TR 420).

to the mainland which formed the northwest perimeter of the Bay.

Florida contends that the 1868 Act was a significant act in terms of international consequences because no one in the world considered a national or state boundary to encompass an area of less dignity than sovereign, imperium and dominium, until the Supreme Court's decision in *U.S. v. California*[53] which has no binding effect on international attitudes.

It is not only lawful that Florida has asserted her sovereignty in Florida Bay under the 1868 Constitution, but it is also appropriate, for the Supreme Court as late as this year in *Askew v. American Waterways Operators Inc.* cited with approval *Manchester v. Massachusetts*, 139 U.S. 240, 266, where the Court stated that if Congress fails to assume control of fisheries in a bay, "the right to control such fisheries must remain with the State which contains such bays."

5. *THE BOUNDARY BETWEEN THE ATLANTIC OCEAN AND THE GULF OF MEXICO IS AT LATITUDE 25° 40′ NORTH*

As it uniquely relates to Florida, a determination of rights under the Submerged Lands Act mandates a determination of the demarcation between the Gulf of Mexico and the Atlantic Ocean. Thus, assuming, Arguendo, the Federal Government's contentions as supported by the Master's findings are correct of that Florida is limited to three geographic miles in the Atlantic and to three leagues in the Gulf of Mexico, it is imperative to the resolution of the case to determine what portion of Florida's coast line is adjacent to the Gulf and what portion is adjacent to the Atlantic.

The Submerged Lands Act repeatedly refers to the Atlantic and Gulf in several subsections of 43 U.S.C., Section 1301,

[53] 332 U.S. 19 (1947).

but no section in the act defines the location of these geographical areas; consequently, external sources are required to give meaning to the act.

Florida contends the boundary between the two bodies of waters is latitude 25°40′ North, the position of Cape Florida, which means the Florida Keys and Straits of Florida Southwesterly of said latitude are located in the Gulf of Mexico.[64]

The Federal Government contends the boundary between the two bodies of water is a line North from Cuba along the 83rd meridian to the latitude of the South point of the Dry Tortugas (24°35′N.), along this parallel eastward to Rebecca Shoal (82°35′W.), thence through the Shoals and along the Florida Keys to the mainland.[65]

The Master adopts the position of the Federal Government located where it is understood to exist by "geologists, mariners, on the premise that the Gulf of Mexico should be conceptually explorers and historians." We agree. Nevertheless, the Master, as will be shown, abused his discretion by ignoring overwhelming evidence which is contrary to his finding, to approve a definition of the Gulf presented from one unsupported source and negated by that source itself.

The Federal Government takes its description, adopted by the Master, of the Gulf from the International Hydrographic Bureau's Special Publication No. 23 entitled *Limits of Oceans and Seas.*[66] For proof of its contention in this regard, Plaintiff primarily relies on the existence of the document which contains the definition; however, the document on its face[67] states, "these limits have no political significance whatsoever."

[64] Florida's contention is based on the conclusion of Dr. Robert N. Ginsburg at TR 294.

[65] Post-Trial Brief of U.S. at 73-74.

[66] Florida Exhibit No. 7.

[67] Preface to Third Edition.

Just as importantly, in the same preface the authors relate that the document is "not to be regarded as representing the result of full geographic study; the bathymetric results of various oceanographic expeditions have however been taken into consideration so far as possible, and it is therefore hoped that these delimitations will also prove acceptable to oceanographers." The authors make it quite clear that the delimitations are primarily for uniformity in dealing with areas in various publications, and indicate geographc and bathymetric studies are desirable criteria in placing the geographical location of areas.

Dr. Ginsburg, an expert in marine geology and sedimentology testified unequivocally that the Internatinoal Hydrographic Bureau's boundary between the Gulf and Atlantic has no scientific basis whatsoever in terms of those parameters which form the basis for geologic and geomorphic boundaries.[68]

The Federal Government suggests, and the Master agrees at Page 20 of his Report, that Chapter 29744, Laws of Florida, 1955[69] which stated that the Florida Straits are an arm of the Atlantic Ocean should have some bearing on where the Gulf and Atlantic are actually located, and should have effect on defining the meaning of terms within the Submerged Lands Act.

Of course, Florida Statutes do not control the meaning and intent of Federal acts of Congress or should they be given that result. Furthermore, Florida is certain that if its acts stated the Florida Straits were in the Gulf of Mexico, the Federal Government would contend should expression has no place in the determination of Congressional intent.

[68] TR 287, 457.
[69] U.S. Exhibit No. 91.

Additionally, Chapter 29744 was repealed by virtue of Chapter 71-348, Laws of Florida, 1971, which indicates the Florida Legislature does not know or have a continuing opinion as to the location of the Gulf of Mexico.

Nevertheless, the record reveals geologists and oceanographers define the Straits of Florida and Florida Keys as being in the Gulf of Mexico.

In the 1957 edition of the Encyclopedia Britannica, Volume 15, at Page 397[70] defines the Gulf of Mexico as follows:

> "Mexico, Gulf of, a mediterranean gulf almost surrounded by the coasts of the United States and Mexico, and forming the northern division of the extension of the westward of the west Atlantic trench (see Atlantic Ocean). Its southern boundary is defined by the partly submerged ridge which extends eastward from the peninsula of Yucatan, and on which the island of Cuba is situated; *to the east it communicates directly with the Atlantic by the Strait of Florida.*"
>
> "*The continental shelf is for the most part narrow, its breadth is 6 mi. at Cape Florida,* 120 mi. along the west coast of Florida, 10 mi. at the southern pass of the Mississippi, 130 mi. near the boundary of Texas and Louisana, and 15 mi. off Veracruz." [Emphasis supplied].

The article is quite clear to the effect that Cape Florida off Miami and the Florida Keys are within the Eastern margins of the Gulf. (TR 275)

Dr. DeVorsey, witness for the Plaintiff, agreed the 1957 edition included most of the Straits of Florida in the Gulf of Mexico (TR 539); however, the 1971 edition of the Encyclopedia Britannica would seem to differ with the 1957 edition

[70] Florida Exhibit No. 3.

as to the location of the Gulf because of stated difference in total area indicating the Straits of Florida were deleted in the later edition.

The 1971 edition listed its only reference source as Volume 55, Fishery Bulletin of the Fish and Wildlife Service, Government Printing Office, 1954 (TR 540). The Federal Government Document did not support the 1971 edition but in fact affirmed the 1954 edition. Consider the testimony of Dr. DeVorsey at TR 541 reading from the Fishery Bulletin:

Q. Then would you turn to page 51 in Bulletin 55 and read the paragraph marked in red. . . .

A. Biogenous Environment, and then the paragraph reads, "The Florida Keys are partly coralline, partly of other origin (Cooke, 1945, Plate 1, and 1939, pages 68 through 72). "The main eastern key range is considered to be a former barrier coral reef of the elevated Pleistocene Pamlico (25 foot) shoreline, now emerged and dead. Its highest present natural ground elevations are said to be about 18 feet above present mean sea level. "This key range ends to the southwest in the Boot, Marathon and Vaca group of Keys."

Q. From reading this source material on which Mr. Kyer drafted his article, can we conclude that the source states that the Keys and the Straits of Florida are in the Gulf of Mexico?

A. Yes.

In the 1971 edition of the McGraw-Hill Encyclopedia of Science and Technology on Page 337,[71] the Oceanographer Hugh J. McLellan describes the Florida Shelf and Florida

[71] Florida Exhibit No. 4.

Keys as being part of the submarine structures and deposits of the Gulf of Mexico. (TR 276).

In the March, 1971 edition of the prestigious *Bulletin of the Geological Society of America* Dr. Robert W. Bergantino in his article[72] makes it quite clear that he includes the area South of the Florida Keys up to longitude 80° West as part of the Gulf. (TR 278)

Again in the March 1972 edition of the Bulletin of the Geology Society of America, two authors Drs. Oscar Wilhelm and Maurice Ewuing in an article entitled "Geology and History of the Gulf of Mexico"[73] place the Straits of Florida and the entire Florida Platform in the Gulf of Mexico. (TR 279-282)

Dr. Ginsburg constructed the location of the Gulf by considering primarily submarine topography and the underlying geologic structure of the Gulf Basin. This primary consideration was supported by contrasting the coast line and bottom deposits or sediments of the two regions in question. (TR 288)

Dr. Ginsburg testified that:

"The most direct way to consider the boundary indicated by the submarine topography is to visualize the region as a terrestrial landscape. If all the covering seawater were removed, the boundary of the Gulf Basin would be determined as it is for terrestrial basins by the limits of its watershed. The limit of the watersheds between adjacent

[72] Florida Exhibit No. 5.
[73] Florida Exhibit No. 6.

basins is the drainage divide, the line that separates surface basins."

By utilizing three contour charts[74] the witness positioned the northern boundary of the Gulf at latitude 25° 531′ North. In considering sediments, Dr. Ginsburg testified commencing at 292:

Q. Are there changes in geologic structure or bottom deposits that occur near the boundary you have suggested of Latitude 25° 53′ North?

A. Yes, there are two important changes in the coastal and terrestrial topography at about this same latitude and a major change in the bottom deposits.

The Atlantic Coast of the United States from Long Island to Key Biscayne, Florida is characterized by sandy beaches of siliceous sand. For most of this distance, and especially along the Florida and Georgia coasts, the shoreline is formed by barrier islands of siliceous sand separated from the mainland.

The last of these barrier islands is Key Biscayne, and the southernmost piont of Key Biscayne, the location of the former Cape Florida Lighthouse, is at Latitude 25° 40′ North. . . .

Some five miles south of Cape Florida at Soldier Key, Latitude 25° 35′ 30″ North, is the first exposure of Late Pleistocene Key Largo Limestone, an elevated coral reef some 100,000 years old.

The Key Largo Limestone extends from Soldier Key, some 150 miles to Key West; it forms the Upper Florida Keys and the southeast-facing margins of the Lower Keys.

[74] Florida Exhibits 9, 10 and 11.

This relatively abrupt change from elevated coral reef limestone south of Soldier Key to Atlantic type sandy barrier islands north of Cape Florida is a major change in coastal type and coastal morphology.

Q. Considering all the evidence you have discussed, where would you place the boundary between the Gulf and Atlantic?

A. In my opinion, the boundary should be located at Latitude 25° 40′ North, the position of Cape Florida, which means the Florida Keys and the Straits of Florida southwesterly of Latitude 25° 40′ North are located in the Gulf of Mexico.

The weight and quality of evidence clearly indicates that Florida's contention as to the location of the Gulf of Mexico is correct.

FLORIDA'S CLAIM TO FLORIDA BAY AS A JURIDICAL BAY

The Master on Page 46 of his Report finds the area lying east of a straight line from East Cape of Cape Sable to Knight Key is a juridical bay.

Nevertheless, the Master on Page 47 of his Report finds Key West, rather than Knight Key, is the natural southern entrance point of Florida Bay and states the closing line of Florida Bay should be drawn from East Cape of Cape Sable to the Spenish banks low-tide elevation which is about two miles northeast of Big Spanish Key, except for a gap in the chain of keys west of Knight Key through which the Moser Channel passes. The Master finds the channel has a depth of ten to fifteen feet and the channel separates the "lower Florida Keys" from the "upper keys".

The Master errs in his finding that the lower keys are separated from the upper keys or that any of the keys are separated from the mainland. The source of the Master's error lies in his apparent and absolute disregard of the Overseas Highway (United States Highway No. 1). Also, it should need no supporting documentation to assert that a fifteen-foot channel will not accommodate ocean-going vessels.

United States Highway No. 1 stretches from Jew Fish Creek to Key West, a distance of 107.6 miles and crosses 63 keys connected by 42 bridges, none of which span a channel sufficient for navigation by ocean-going vessels with a draft greater than 25 feet. (Florida Exhibit 164, TR 221).

Clearly, the keys are connected to the mainland by activity of the Federal Government in financing and constructing the overseas highways and no distinction should be made as to lower and upper keys. The keys must, as a matter of fact, be considered as a part of the mainland and the Master erred in finding that the keys were separated in any way from each other. The Court must disregard the Master's Order and find that the closing line of Florida Bay, as a juridical bay, is drawn from East Cape of Cape Sable to the Spanish banks low-tide elevation as stated above.

SUMMARY

The Master should have found as follows based on the weight of the evidence and the controlling law, and he clearly erred in finding to the contrary:

(1) That the Act of Congress of June 25, 1868, 15 Stat. 73, approving Florida's boundary was an implied grant to the State of Florida of the right, title and interest possessed by the United States in such area or any interest subsequently obtained by the United States.

(2) That the boundary approved by Congress in 1868 is Florida's only lawful boundary and has not been modified by any subsequent unilateral legislative act of the State of Florida, and such boundary should be construed in relevant part as follows:

> "Begin at the point where the middle of the St. Mary's River meets the last aid to navigation marking the entrance to said river; thence southeastwardly to and along the 10-fathom contour line paralleling the cost of Florida to a point where such line intersects with the 100-fathom contour line which marks the western edge of the Gulf Stream; thence in a general southwestwardly direction along the 100-fathom line to a point due east of Fowey Rocks; thence in a general southwestwardly and westwardly direction along the southern edge of the Florida reefs to a point due south of Loggerhead Key, the westernmost of the Dry Tortugas Islands; thence westwardly, northerly and eastwardly along the arch of a curve three leagues distance from Loggerhead Key to a point due north of Loggerhead Key; thence northeast along a straight line to a point three leagues from the coastline of Florida . . ."

(3) That the area bound on the south by the Florida Keys, on the northwest by the mainland of Florida and on the northwest by line north 045 degrees east from the Tortugas Islands to Cape Romans is historic waters or an historic bay and as such is an integral geographical part of the state, and such area should be enclosed by base lines marking the outer limits of inland waters as follows:

"Beginning at the seaward end of the northern Jetty of Miami Harbor, Miami, Florida, also known as Government Cut, said point being the point of beginning of a base line; thence running on a direct line southeasterly to Fowey Rocks, thence in a southwesterly direction thruogh Brewster Reef, Ledbury Reef, Star Reef, Triumph Reef, Long Reef, Ajax Reef, Pacific Reef, Turtle Reef, Carysfort Reef, The Ecbow, French Reef, Molasses Reef, Picles Reef, Conch Reef, Little Conch Reef, Davis Reef, Crocker Reef, Alligator Reef, to the Tennessee Reef Light better described on Coast and Geodetic Survey Chart No. 1250 as FL. 4 Sec. 49 ft. 12M, thence continue in a southwesterly direction through Sombrero Key, Looe Key, American Shoal, Maryland Shoal, Pelican Shoal, Eastern Sambo, Western Sambo, Eastern Dry Rocks, and Sand Key to the Western Dry Rock, thence in a northwesterly direction through Vestal Shoal, Coalbin Rock, to Cosgrove Shoal; thence in a direct line to an unnamed rock, lying 231 degrees from the Lighthouse at Loggerhead Key at a distance of 4,224 feet more or less, thence in a northeasterly dircetion to Texas Rock, thence in a direct line northeasterly to the southernmost point of Cape Romano.

(4) In the alternative, if Florida is incorrect in its first contention and Florida's territory in the Atlantic and Gulf of Mexico is limited to a claim under the Submerged Act, then the line dividing the Gulf of Mexico from the Atlantic should be located at longitudie 25 degrees 40 minutes north, the position of Cape Florida, which means the Florida Kays and the

State of Florida southwestwardly of said latitude are located in the Gulf of Mexico.

(5) In the alternative, if Florida is incorrect in its first three contentions, then the Master's Report should be accepted, except that the base line enclosing Florida Bay as a juridical bay should be drawn from East Cape of Cape Sable to the Spanish banks low-tide elevation which is about two miles northeast of Big Spanish Key, and that line should make the outer limits of Florida's inland waters on that portion of her coastline.

Respectfully submitted

ROBERT L. SHEVIN
Attorney General

DANIEL S. DEARING
Chief Trial Counsel

W. ROBERT OLIVE, JR.
Special Assistant Attorney General

Attorneys for The State of Florida

April 24, 1974